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Supreme Court of the United States

OCTOBER TERM, 1948

No. 387

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER,

vs.

CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED DECEMBER 6, 1948.

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9763.

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

JOINT APPENDIX.

Petition of Transcontinental & Western Air, Inc., for Review of Order of the Civil Aeronautics Board

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia:

Petitioner, Transcontinental & Western Air, Inc., respectfully shows:

1. Petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the State of Missouri. Petitioner is an air carrier engaged in the transportation of persons, property and mail by air-

craft in the United States and elsewhere pursuant to certificates of public convenience and necessity issued to it under the Civil Aeronautics Act of 1938 (hereinafter sometimes referred to as the "Act").

2. This petition is filed under, and the jurisdiction of this Court is based on, Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U. S. C. Sec. 646, providing for review by this Court of orders of the Civil Aeronautics Board (hereinafter sometimes referred to as the "Board"). Petitioner seeks review of an order, Serial Number E-1033, in Docket No. 2849, issued and entered by the Board on December 2, 1947, in a proceeding described in paragraph 3 hereof, and served on petitioner on December 5, 1947.

3. The nature of the proceedings before the Civil Aeronautics Board which resulted in the order sought to be reviewed was as follows:

(a) By petition filed March 14, 1947, pursuant to Section 406 of the Act, petitioner applied to the Board for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over certain routes operated by it wholly within the United States and designated as Routes No. 2, 38, 44 and 58. Petitioner stated therein, among other things, that costs of providing air transport services had during the preceding year continued to rise at an unprecedented rate while load factors, including mail loads, had declined materially; that it had suffered substantial loss through extraordinary events, including the grounding by Government order of aircraft known as Constellations and the suspension of all operations as a result of a pilots' strike, which had affected it alone among all United States domestic airlines; and that the record of the preceding year and all reasonable forecasts of the results of future operations established the need for an immediate adjustment of air mail compensation to provide

the relief contemplated by the Act. Petitioner alleged therein, among other things, that the rate of compensation then applicable was not, and from and after January 1, 1946 had not been, a fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith on said routes within the meaning of Section 406 of the Act. The proceeding upon that petition is the Board's Docket No. 2849.

(b) By motion dated May 27, 1947, Public Counsel of the Board moved the Board to enter an order denying said petition, without a hearing on the facts, in so far as it requested an increase in mail rate from January 1, 1946 to March 14, 1947, on the ground, among others, that such adjustment should not be made as a matter of sound general policy. Petitioner filed an answer, dated June 11, 1947, to said motion of Public Counsel. Thereafter, by amendment dated June 23, 1947, Public Counsel amended their motion to dismiss by adding as a ground therefor that the Board had no authority to grant said petition in so far as it related to a period prior to the filing thereof.

(c) Oral argument was held before the Board on July 16, 1947.

(d) On December 2, 1947, the Board (Member Lee dissenting) caused to be entered the order sought to be reviewed herein, dismissing the petition in so far as it requested the fixing of a mail rate for a period prior to March 14, 1947.

4. On January 20, 1948, within the time provided by the regulations of the Board as extended by stipulation, petitioner filed with the Board a petition for reconsideration and reargument of its said order. Said petition has not yet been acted upon. This petition for review by this Court is filed within sixty days after the entry of the order sought to be reviewed, in accordance with Section 1006 of the Civil Aeronautics Act of 1938 and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. Sec. 1009.

5. The order sought to be reviewed is a final adjudication and determination of petitioner's application to the Board to fix fair and reasonable rates for the period from January 1, 1946 to March 14, 1947 and of its right to additional compensation therefor. Petitioner has a substantial interest in said order, within the meaning of Section 1006 of the Civil Aeronautics Act of 1938, as is shown by the facts set forth herein and particularly since it is deprived thereby of the difference between the air mail compensation paid it for the period from January 1, 1946 to March 14, 1947 and the fair and reasonable compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith as furnished by petitioner during said period. Petitioner has suffered irreparable injury and will continue to suffer irreparable injury unless the order sought to be reviewed is set aside.

6. Petitioner prays for review of said order by this Court and that, upon said review, this Court set aside said order and direct further proceedings in accordance with the Civil Aeronautics Act of 1938.

7. By the order sought to be reviewed a majority of the then members of the Board erroneously held that the Board has no power to fix fair and reasonable rates of compensation for any period prior to the date of the filing of a petition therefor. Said order is, to the prejudice of petitioner, arbitrary, capricious and contrary to law. Without limiting the generality of the foregoing, petitioner assigns the following errors:

(a) The Board's conclusion as a matter of law that it does not have authority to fix a retroactive rate in this case (p. 8 of its opinion, made a part of said order) is contrary to the Civil Aeronautics Act of 1938, and particularly to Section 406(a) thereof empowering and directing it upon the petition of an air carrier to "fix and determine from time to time" reasonable rates of compensation and "to make such rates effective from such dates as it shall determine to be proper."

(b) The Board's decision, before a hearing and not based on any evidence on which it could determine whether the rate in effect from January 1, 1946 to March 14, 1947 was fair and reasonable, is contrary to Section 406(a) of the Act, fails to take into consideration rate-making elements as required by Section 406(b) of the Act and the declaration of policy and statement of public interest contained in Section 2 of the Act, and is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

(c) The Board's power to fix rates "from such date as it shall determine to be proper" being clear under the Act, its inquiry whether Section 406(a) "was not intended to have a somewhat narrower meaning" (p. 9) is improper, unwarranted and contrary to law.

(d) The Board's conclusion that "the Act was never intended to vest in the Board the retroactive rate-making power" (pp. 9-10) is erroneous and without support in law or fact.

(e) The Board's application to the Act of provisions of, and decisions under, public utility regulatory and other statutes (pp. 10-14), in disregard of the particular provisions of the Act, is improper, unwarranted and contrary to law; and the provisions of, and decisions under, such public utility regulatory and other statutes do not support the Board's conclusion concerning the intent or meaning of the Act or its power thereunder.

(f) The Board erred in considering as evidence of legislative intent ambiguous statements made by a private individual before Congressional Committees (pp. 17-19), and such statements do not support the Board's conclusion that "no retroactive rate-making authority was in fact intended" by the statutory provision authorizing it to make rates effective "from such date as it shall determine to be proper" (p. 19).

(g) The Board erred in holding that it has no power under the Act to exercise discretion, after hearing the facts

of each case, and in disregarding its previous exercise and recognition of this power.

(h) The Board's refusal to award petitioner the fair and reasonable compensation for the period from January 1, 1946 to March 14, 1947 is a deprivation of property without due process of law and a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

8. No previous application for the relief sought herein has been made to any other court or judge.

WHEREFORE, petitioner respectfully prays that this Court review the said order of the Board, issued on December 2, 1947; that a copy of this petition be forthwith transmitted to the Board and that a transcript of the record upon which said order was entered be thereupon certified and filed by the Board in this Court, in accordance with the Act; that upon such review by this Court, the said order be set aside and further proceedings by the Board ordered; and that petitioner have such other, further and different relief as to this Court may seem just and proper.

Dated: January 30, 1948.

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner

By GERALD B. BROPHY,
JAMES K. CRIMMINS,
Attorneys for Petitioner,

Office & P. O. Address:
25 Broadway,
New York 4, N. Y.

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
25 Broadway,
New York 4, N. Y.
of Counsel.

STATE OF NEW YORK,
County of New York, ss:

JAMES K. CRIMMINS, being duly sworn, deposes and says that he is one of the attorneys for petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true, and that the reason why this verification is not made by the petitioner is that the said petitioner is a foreign corporation.

JAMES K. CRIMMINS.

Sworn to and subscribed before me
this 30th day of January, 1948.

DOROTHEA A. O'BRIEN

Dorothea A. O'Brien
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 111, Reg. No. 101-0-9
N. Y. Co. Clk's No. 41, Reg. No. 173-0-9
Commission expires March 30, 1949

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Civil Aeronautics Board

Docket No. 2849

In the Matter of the Petition of
TRANSCONTINENTAL & WESTERN AIR, INC.

for an order fixing and determining fair and reasonable rates of compensation for transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58, pursuant to Section 406 of the Civil Aeronautics Act of 1938

Petition for an Order Fixing Rates of Compensation for the Transportation of Mail by Aircraft on Routes No. 2, 38, 44 and 58

TO THE HONORABLE, THE CIVIL AERONAUTICS BOARD:

TRANSCONTINENTAL & WESTERN AIR, INC. (hereinafter called "TWA") respectfully states:

1. During the past year, costs of providing air transport services have continued to rise at an unprecedented rate. At the same time, load factors have declined materially. This has been particularly true of mail loads, which have fallen off even more drastically than other traffic since the cessation of hostilities.

These factors of rising costs and declining loads have affected TWA and every other air carrier. In addition, TWA has suffered substantial loss through three events of catastrophic proportions, which affected TWA alone among all United States domestic airlines.

The new four-engine Constellation aircraft, deliveries of which to TWA began in September 1945, remained on the ground for months as the result of controversies with the Air Line Pilots Association as to rates of pay, rules and working conditions applicable to such aircraft.

3. Scheduled service with this equipment therefore

could not be inaugurated, even on a limited scale, until February, 1946, and could be increased only very gradually thereafter. Notwithstanding this event and the resulting losses, TWA reported a net profit from operations for the month of June 1946, and anticipated profitable operations during the following months.

However, on July 11, 1946, all Constellation aircraft were grounded by order of the Administrator of Civil Aeronautics. As a consequence, all the Constellations owned by TWA were out of revenue service until the middle of September, and many considerably longer, while required modifications were being made. Virtually all of TWA's costs continued throughout this period. The anticipated profitable summer operations were thus converted into serious losses. TWA was at that time the only domestic air carrier operating Constellation aircraft within the United States.

TWA was only beginning to recover from the grounding and its consequences when operations throughout its entire system were completely shut down on October 21, 1946 by a strike of the airline pilots. This strike followed a 30-hour ultimatum for wage demands substantially in excess of the rates recommended by the Fact Finding Board appointed by President Truman which TWA had placed into effect. The union demands, if granted, would have meant still more drastic increases in the cost of air transportation to TWA and to the entire air transport industry. The shutdown continued for almost four weeks, and resulted in further severe losses to TWA. These losses are continuing and will continue for some time in the future as efforts are made to rebuild traffic volume and restore service to the required levels.

The record of the past year, and all reasonable forecasts of the results of future operations, establish the need for an immediate adjustment of air mail compensation to provide the relief contemplated by the Civil Aeronautics Act.

B. Accordingly TWA submits this petition under Section 406 of the Civil Aeronautics Act for the determination of fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58,* and in compliance with the Board's regulations alleges the following:

1. TWA is a corporation duly organized and existing under the laws of the State of Delaware with its principal office located at No. 101 West 11th Street, Kansas City 6, Missouri.

2. TWA holds certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing it to engage in scheduled air transportation with respect to persons, property and mail on Routes No. 2, 38, 44 and 58. TWA also holds a certificate of public convenience and necessity for foreign air transportation approved by the President July 5, 1945, as amended.

3. The rate of compensation currently applicable to the transportation of mail by aircraft on Routes No. 2, 38, 44 and 58 is 45 cents per ton-mile, or fraction thereof, of mail carried. This rate became effective on January 1, 1945, as the result of final order of the Board in Docket No. 1700, dated October 26, 1945 (Order Serial No. 4151).

4. Said rate of compensation to TWA is not, and from and after January 1, 1946 has not been a fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith on Routes No. 2, 38, 44 and 58, within the meaning of Section 406 of the Civil Aeronautics Act of 1938.

5. Pursuant to subdivision (c) of Section 406 of the Civil Aeronautics Act of 1938, TWA states that it believes that from and after January 1, 1946, the fair and reasonable rate of compensation to it for the transportation of mail

* Wherever Route No. 2 is referred to in this Petition it shall be deemed to include Routes No. 2, 36, 37, 61 and 67, which were consolidated into the single Route No. 2 by the Board's order of September 23, 1946, No. 5200.

by aircraft, the facilities used and useful therefor, and the services connected therewith, over Routes No. 2, 38, 44 and 58, is at least the following: a base rate of thirty cents (30¢) per airplane mile to be paid for a base poundage of 300 pounds of mail or less, plus an excess poundage rate of 0.03 cents per airplane mile for each pound, or fraction thereof, of mail in excess of the base poundage, computed monthly on direct airport-to-airport mileage; said rate to be appropriately reduced in respect of future periods, as conditions may warrant.

WHEREFORE, the Petitioner prays that in view of the urgency of the situation, the Board expedite this petition by utilizing its show cause procedure based on information available to the Board; and that the Board issue an order granting the relief herein requested, or such other and further relief as it may determine to be proper.

The Petitioner has served a copy of this petition on the Postmaster General by sending the same to him by registered mail post-paid prior to the filing of the petition with the Board.

Respectfully submitted,

TRANSCONTINENTAL & WESTERN AIR, INC.
By JOHN A. COLLINGS
Vice President

FRANK E. BUSCH
Director of Operations

LEO R. GILLERAN
Controller

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
Attorneys for Petitioner,
Office and Post Office Address,
25 Broadway,
New York 4, N. Y.

6 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

JOHN A. COLLINGS, being duly sworn, deposes and says that he is Vice President and, in the absence of the President and Executive Vice President, the Chief Executive of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the Petition is true and no such statement is misleading.

JOHN A. COLLINGS.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

7 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

FRANK E. BUSCH, being duly sworn, deposes and says that he is Director of Operations of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above-entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the Petition is true and no such statement is misleading.

FRANK E. BUSCH.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

8 STATE OF MISSOURI, COUNTY OF JACKSON, ss.:

LEO R. GILLERAN, being duly sworn, deposes and says that he is the Controller and, in the absence of the Treasurer, chief financial officer of TRANSCONTINENTAL & WESTERN AIR, INC., the Petitioner in the above-entitled Petition; that he has read and is familiar with the contents of the Petition; that he intends and desires that in granting or denying the relief applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that to the best of his information and belief, every statement contained in the petition is true and no such statement is misleading.

LEO R. GILLERAN.

Subscribed and sworn to before me by the affiant above named, this 12th day of March, 1947.

E. WILEY BARKER
Notary Public

My Commission Expires Oct. 20, 1948
(Seal)

9 May 27 11:38 A. M. '47

Motion of Public Counsel to Dismiss Petition for Retroactive Rate

Public Counsel move the Board to enter an order denying the petition filed herein on March 14, 1947 by Transcontinental and Western Air, Inc. (hereinafter called

TWA) insofar as such petition requests an increase in TWA's domestic mail rate, prior to the date of the filing of the petition by TWA (from January 1, 1946 to March 14, 1947) in the amount of $11,157,358, and in support of their motion allege and represent the following:

1. That the Board, by opinion[1] and order (Order Serial No. 4151) issued October 26, 1945, fixed and determined for TWA a mail rate effective on and after January 1, 1945 of 45 cents per ton mile over its entire domestic system including all of the routes covered by the petition filed by TWA on March 14, 1947, which rate is still in effect.

2. That TWA, on March 14, 1947, filed a petition requesting the establishment of a mail rate of 30 cents per airplane mile to be effective on and after January 1, 1946 over Routes Nos. 2,[2] 38, 44 and 58, and that this petition requested the retroactive adjustment of mail rates prior to the date of filing the petition for the period January 1, 1946 to March 14, 1947, which if granted, would result in TWA's receiving an amount of $11,157,358 in retroactive mail pay, in addition to the $3,541,000[3] which TWA has already received for this period. This would result in total mail pay of $14,698,358, or 415 per cent of that previously fixed by the Board.

3. That there has been no mail rate proceeding affecting these routes since the Board fixed TWA's present mail rate on October 26, 1945 until the present petition on March 14, 1947, yet petitioner is asking for a rate retroactive to January 1, 1946, barely two months after the Board rendered its decision.

4. That the Board should not increase TWA's mail pay prior to the filing date of its petition for the following reasons:

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[1] Transcontinental & Western Air, Inc., Mail Rates, 6 CAB 595 (1945).

[2] Route No. 2 in this proceeding includes Routes Nos. 36, 37, 61 and 67 which were consolidated into said Route No. 2 by Board Order No. 5200 issued September 23, 1946.

[3] Actual mail pay received by TWA for the 14 days in March is estimated.

(a) *The Board has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending.*

The Board has enunciated its position as follows:

"* * * Aside from the question of whether it has the statutory power to review a rate prior to the date of the institution of the proceeding, it seems desirable as a matter of policy that the rate for any given period become finally fixed at some point in time and that such point be that at which the rate is first challenged or questioned by the institution of a rate proceeding either by the carrier or by the Board. Such a policy appears to be fair since it permits every rate order to be final for any period during which it is not questioned by a proceeding looking toward its revision."[4]

". . . a rate once fixed should remain final at least until such time as the rate is first publicly challenged or questioned by the institution of a rate proceeding, either upon petition of the carrier or on the Board's initiative."

* * * * * * * * * * *

"All factors considered, we are of the opinion that as a matter of sound general policy there should be no adjustments in mail rates during periods when a rate case is not pending. We believe that the interest in certainty and finality of administrative proceedings will be served by a policy which will provide for an adjustment of rates only when an issue has been raised with respect thereto by the institution of a proceeding, thereby putting all interested persons on notice that the rate may be adjusted and that conduct should be determined in such light."[5]

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[4] Continental Air Lines, Inc., Mail Rates, 3 CAB 395, 401 (1942).

[5] Braniff Airways, Inc., Mail Rates, 3 CAB 633, 635-637 (1942). *Accord:* Continental Airlines, Inc., Mail Rates, 2 CAB 683, 688 (1941); Mid-Continent Airlines, Inc., Mail Rates, 3 CAB 464, 466 (1942); Transcontinental & Western Air, Inc., Mail Rates, 4 CAB 139, 143 (1943); All American Aviation, Mail Rates, 4 CAB 354, 357 (1943); Pan American Airways, Inc., Alaska Mail Rates, 6 CAB 61, 69 (1944).

The above policy of the Board permits every rate order to be final during a period in which it is not in question by a proceeding relative to its revision. The principle of finality has long been recognized not only by the Board, but by courts and other administrative agencies as being supported by the strongest considerations of public interest and essential to the proper fixing of rates. It encourages efficiency and economy not only by requiring a carrier to live within a rate until time has established the necessity of challenging the rate, but also, by assuring the carrier that any profits earned during a period when no proceeding is pending, may be retained. The TWA petition if granted would, by destroying the finality principle, discourage efficiency and economy. The incentive to live within a rate finally fixed by the Board would be destroyed.

Moreover, if the Board grants increases in mail pay for extraordinary losses incurred in a period prior to the filing of the petition it could not, consistent with its obligations to the public treasury, refuse to recapture extraordinary profits earned in such retroactive periods. Thus, managerial incentives to accomplish increased economies in operation would be substantially reduced, and by writing a question mark across any carrier's financial statements the carrier's ability to attract capital would be seriously impaired.

(b) *The Board has never adjusted a final mail rate effective prior to the date of the petition because of unusual circumstances.*

In a number of cases carriers have requested that adjustments in mail pay be made effective prior to the date of filing of petition on the ground of unusual circumstances,

but in every case the Board has denied such request.[6] In *Transcontinental and Western Air, Inc.*, Mail Rates, 4 CAB 139 (1943), the present petitioner itself filed a petition on March 13, 1941 seeking a retroactive adjustment of its mail rate for Route No. 2, effective as of October 1, 1940 on the ground that its rate had been based on the cost and revenue figures of Douglas equipment, and did not take into account the effect of TWA's new Boeing 307 equipment on its costs and revenues. TWA contended that its rate should be adjusted prior to the petition to October 1, 1940 because since that date it had gained sufficient experience in operating the Boeings so that the effect of the Boeing operations on TWA's mail rate should be considered. Petitioner also contended that its rate over Route No. 2 was inadequate. This case was consolidated with another rate proceeding involving Routes No. 36, 37, 38 and 44. The Board rejected TWA's contentions and refused to deviate from its "... policy of not reviewing rates prior to the institution of a proceeding by petition or by order..."

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The Western case[7] represents no departure from this policy. In that case the carrier petitioned on December 3, 1941 for a system rate to be effective from the date of the petition for Routes 13 and 19, and to be effective from June 12, 1941, for Route 52. The rates on Routes 13 and 19 had been in effect since October 28, 1938, while mail service on Route 52 had first commenced on June 12, 1941, and no

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[6] (a) In All American Aviation, Inc., Mail Rates, *supra*, All American petitioned for a retroactive increase of its mail rate on the ground that it was merely an adjunct of the post office and that the Board in fixing its present rate had erred with respect to All American's anticipated revenues and costs. All American contended that it could never regain its losses unless the Board looked past the date of the petition and adjusted its rate. The Board would not deviate from its policy of not retroactively adjusting a mail rate. *Accord:* Braniff Airways, Inc., Mail Rates, *supra*.

(b) In Pan American Airways, Inc., Alaska Mail Rates, *supra*, Pan American petitioned for a retroactive increase of its mail rate on the ground that it had delayed in filing its petition because of doubts as to the legal status of certain of its routes. Again, the Board adhered to its policy of not retroactively adjusting a mail rate.

[7] Western Airlines, Inc., Mail Rates, 4 CAB 451 (1943).

mail rate had ever been fixed for that route. Obviously, since no mail rate had been fixed for the carriage of mail on Route 52, the Board was obligated to consider the need of the carrier for compensation because of the carriage of mail over this route. As the Board stated, p. 444:

"Although respondent transported mail on Route
14 No. 52 at all times subsequent to June 12, 1941, no rate proceeding was pending during the period from June 12, 1941, to December 3, 1941, at which time the carrier filed its petition. Under the circumstances a review of respondent's need for mail compensation subsequent to June 12, 1941, is in order. The Board has reviewed respondent's need for mail compensation during the entire period from June 12, 1941, to December 31, 1942, and having found the mail compensation already paid respondent was adequate to meet all of its need has not undertaken to attribute that compensation to particular routes by prescribing the rates to be applicable to the several routes of the carrier throughout the period under review, since the total compensation of the respondent would not be affected. This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail compensation had been fixed. In the absence of *like* unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order." (Italics supplied)

Upon a review of the entire system operations, including the new route, from June 12, 1941 on, which showed that the carrier had already received sufficient mail pay to yield an annual return of 16.92 per cent after federal taxes on its average investment, the Board found that no additional mail compensation should be paid.

The Western case does not stand for any principle that retroactive mail pay adjustment will be made in cases of

unusual circumstances, but only that such adjustment may be considered under "like" circumstances. The case is merely a recognition by the Board that consideration will be given to a carrier's possible need for additional mail pay because of the operation of a new route for which no mail pay has previously been fixed. The present proceeding raises no such question. The granting of TWA's petition would constitute a major change in Board policy which, if followed to its logical result, and in fairness to all carriers and the public treasury, would undoubtedly open the door to an indefinite number of retroactive rate cases involving either the underwriting of extraordinary losses or the recapture of extraordinary profits.

(c) The allegations in the TWA petition do not justify the fixing of a rate effective prior to the date of the petition.

TWA apparently takes the position that because of the materialization of certain business risks (labor disputes and the grounding of the Constellations) which resulted in losses, the Board should take into account these alleged "unusual circumstances" and adjust its present rate retroactively. As has been pointed out above the Board has never adopted any general policy of making retroactive mail pay adjustments because of "unusual circumstances." Every business including the air transport industry is subject to risks, the exact nature and extent of which cannot be anticipated or computed in fixing a prospective rate. The possibility of grounding of planes or of labor disputes are among normal risks to which all air carriers are subject. In fixing the mail rate of 45 cents per ton mile now in effect for TWA, the Board specifically recognized the possibility of abnormal risks involved in the transitional post-war period. Moreover, although TWA was a service rate carrier, the Board made additional provision therefor by amending the show cause order and increasing the tentative mail rate from 32 to 45

cents per ton mile, an increase of 40.6 per cent. The rate fixed therein was designed to provide TWA with an overall rate of return on total investment of 13.37 per cent after taxes and obviously constituted a rate of earnings which can only be justified on the obvious basis that it is intended to cover losses or reduced earnings which could not be anticipated, but which might occur.

While the Board because of the unpredictable nature of post-war operations did not allocate cost and investment to the mail service, the application of the Board's standard allocation formula to the basic figures employed in fixing the rate as set forth in Appendices Nos. 2 and 3 attached to the Opinion, indicates a rate on the investment in the mail service of 46.74 per cent after taxes.

The recovery of losses resulting from events not specifically foreseeable, but of a type which constitute usual business risks must be made out of earnings for periods both before and after the outcome of such events. TWA's rate of return, as are all rates fixed by the Board, was determined with this principle in mind. Its rate for the future will be based on this same principle. For this reason the rate making technique contemplates that losses incurred as a result of such risks shall be met out of rate of return. The rate of return allowed is materially higher, therefore than it would be if it were contemplated that reimbursement could be had retroactively for actual losses which have in effect materialized.

This principle was recognized in National Airlines, Inc., Mail Rates, CAB Docket No. 824 decided September 19, 1946, in which the carrier had suffered losses arising from a series of accidents, the direct effect of which was to curtail severely its volume of scheduled operations. In addition, its operations were curtailed by a restriction to visual contact flying as ordered by the Civil Aeronautics Administration. The Board held that:

"The costs attributable to the accidents and the losses sustained through the curtailment of service im-

posed because of the petitioner's failure to maintain CAA operating standards, *are not appropriate costs to be allowed under the Act, for rate-making purposes.*" (Italics supplied).

The Board refused to consider these losses as appropriate costs to be allowed under the Act for rate-making purposes even though such losses were incurred during the pendency of a rate proceeding. The alleged unusual losses in this proceeding are of the same type as those in the National case and the Board should not consider them either retroactively or prospectively as proper costs for rate-making purposes.

Conclusion.

The strongest considerations of rate making policy require the dismissal of that part of TWA's petition which requests $11,157,358 retroactive mail pay for the period prior to the filing of the petition. Wherefore, Public Counsel respectfully move the Board for the entry of an order dismissing the petition filed herein insofar as such petition requires the establishment of a mail rate retroactively effective to January 1, 1946.

William C. Burt
Jerome J. Dick
Public Counsel

Washington, D. C.
May 27, 1947

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the attached motion upon all parties appearing of record in this proceeding by mailing to each said party a copy of said motion in a properly addressed, franked envelope.

Jerome J. Dick
Public Counsel.

Washington, D. C.
May 27, 1947.

19 Received Docket Section Jun 13 11.45 AM '47
Civil Aeronautics Board

20 **Answer of Petitioner to Motion of Public Counsel**

To the Honorable, the Civil Aeronautics Board:

The petition for increased mail compensation filed by TWA on March 14, 1947 seeks to recoup part of the losses suffered by TWA since January 1, 1946 as the result of a series of disastrous events which affected TWA alone of all domestic airlines. The petition also asks for expedited action because of the urgency of the situation. After waiting two and a half months, Public Counsel have now filed a motion to dismiss the petition insofar as it requests a review of rates prior to the date the petition was filed, which was the period during which the disastrous events occurred. The motion, strangely enough, does not even discuss either the Board's obligation under the law to grant the relief requested by TWA or the fairness of the claim for relief that has been made by TWA. On the contrary, Public Counsel's motion rests wholly on what they conceive to be a matter of the Board's "general policy" based on dicta appearing in previous cases unrelated to the present proceeding.

It should be made plain at the outset that the only
21 issue properly raised by Public Counsel's motion is whether or not the Board will hear TWA's petition for a review of rates prior to the date the petition was filed. No issue has been raised as to what, if any, relief the Board would accord in the event such a hearing is held. As to the first point, it seems obvious that TWA is entitled as a matter of law to have a hearing on the facts without pre-judgment of any of the issues raised by the unsupported allegations of Public Counsel.

I. Established Principles of Administrative Law Require a Review of TWA's Rates as Requested in Its Petition.

The motion of Public Counsel is frivolous since the Board is "not at liberty to decline to exercise its jurisdiction." *Alton Railroad Co.* v. *United States* 287 U. S. 229 at 236 (1932). There is a long line of Supreme Court cases holding that an administrative agency must accept jurisdiction of applications falling within the statutory authority of the agency. If it refuses to do so the federal courts will compel the agency to assume jurisdiction.* Thus, without first holding a hearing on the facts, the Board may not deny relief which it has the power to grant. On this basis alone the motion must be denied forthwith.

In *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178 (1920) the railroad brought suit for a mandamus to compel the Commission to hear proof on the "present costs of condemnation and damages or of purchase in excess of original cost of present value" of the railroad's property under a valuation statute. The Commission alleged (1) that such items were purely speculative and (2) that the Supreme Court had decided in the *Minnesota Rate Cases* that the calculation of such items would involve unjustifiable assumptions. Nevertheless, the
22 Supreme Court held without dissent that the Commission must proceed with a hearing under the statute, even though the Commission might be correct in its interpretation of the *Minnesota Rate Cases*, saying further (p. 188):

"... since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the *Minnesota Rate* ruling could furnish ground for refusing to carry out the commands of

* *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178; *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474 at 484, 5 (1912). See also *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 Fed. 2d 271 at 281, 2 (1946).

Congress, the exigency of which consideration is none the less manifest though it be borne in mind that the *Minnesota Rate Cases* were decided after the passage of the act in question.

"Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The Supreme Court directed the grant of a writ of mandamus. A similar conclusion, regarding the Civil Aeronautics Board itself, was reached in *W. R. Grace & Co. v. Civil Aeronautics Board*, 154 Fed. 2d 271 at 281, 2 (1946).

Public Counsel raise no question regarding the power of the Board to hear TWA's petition, and clearly no such question exists. Consequently, even if the Board should agree with everything that Public Counsel allege, the Board cannot refuse to hear TWA's petition in full and may not dismiss any part. This rule is so well established that it needs no further elaboration and answers completely the issues raised by Public Counsel's motion. However, the motion of Public Counsel displays such a substantial misconception of the provisions of the Civil Aeronautics Act, and of the position taken by the Board under that Act, that the statements of Public Counsel, even though irrelevant to the motion, should not be permitted to stand unchallenged.

To repeat, the arguments which follow are not necessary to a determination of Public Counsel's motion. Public Counsel's motion must be dismissed because it seeks
23 to deny TWA the hearing which is guaranteed by our laws. The purpose of including the material set

forth below is to correct the erroneous assumptions and impressions implicit in Public Counsel's motion itself.

II. THE PROVISIONS OF THE CIVIL AERONAUTICS ACT CONTEMPLATE A RETROACTIVE INCREASE IN TWA RATES TO JANUARY 1, 1946.

A. *The statute.*

Not only does the Board have an absolute legal obligation to review TWA's rates for 1946, but in addition the Civil Aeronautics Act contemplates that such a review shall result in a retroactive adjustment in an instance of this type.

Under section 406(a) of the Act the Board is not just "empowered" to fix fair and reasonable rates of compensation, but, in addition, it is specifically "directed" to do so. The language is not permissive, it is mandatory. Under section 406(b) of the Act Congress did not give the Board permission to consider or not, as it may choose, the need of the carrier, but specified that the Board "shall take into consideration" the need of the carrier. This too is mandatory.

Finally, section 406(a) of the Act implements these statutory mandates by directing the Board "to make such rates (i.e., 'fair and reasonable rates') effective from such date as it shall determine to be proper."

This last quoted language is for the purpose of carrying out the expressed intent of Congress. It cannot be interpreted, as Public Counsel seem to imply, as authorizing the Board to evade the obligation imposed by Congress to fix fair and reasonable rates of compensation. If an air carrier's mail rates are unfair and unreasonable today, the Board cannot disregard its obligation to fix fair and reasonable rates by determining that it is "proper" that the new scale shall not become effective until some date next year. In giving the Board the administrative discretion to make rates "effective from such date as it shall determine to be proper" Congress did not give the Board the power to disregard its mandate that the rate shall be fair and reasonable.

Similarly, if TWA's rates were unfair and unreasonable during 1946, the Board must so find. In such event the Board must, under the Act, fix fair and reasonable rates for 1946 and make them effective for that period. The Board cannot as Public Counsel apparently argue, refuse to examine the rates for 1946; or upon examination and on a finding that considering an extended period the rates are unfair and unreasonable during 1946, refuse to do anything about them. While Public Counsel do not mention the statute in their motion, the interpretation they necessarily put on the Act would make a farce of the language. Congress did not lay down a directive in one breath, and in the next, give the Board a free hand to defeat the directive. The statute does not say that fair and reasonable rates shall be paid only for the period that the Board arbitrarily selects and that for other periods the rates may be unfair and unreasonable. It says that the rates shall be fair and reasonable for all periods, and that the Board shall make new rates effective on such date as will insure that the amounts received by the carrier will be fair and reasonable. This discretion is vested in the Board to implement the mandate of Congress, not defeat it.

B. *The alleged "general policy" of the Board.*

Public Counsel quote from a decision of the Board in 1942 in which the Board stated, "All factors considered, we are of the opinion that as a matter of sound general policy there should be no adjustments in mail rates during periods when a rate case is not pending." *Braniff Airways, Inc., Mail Rates*, 3 C. A. B. 633, 637 (1942). Based on this and similar language used by the Board in other cases, Public Counsel contend that TWA has no right to a retroactive adjustment.*

* One basic difficulty in Public Counsel's position stems from their interpretation of the phrase "general policy". Public Counsel apparently believe that "general policy" means something that applies to every instance. However, this is not the usual meaning of the word "general" in this context, which properly means "pertaining to the majority; common to the greater number but not to all; true to a large number or proportion; widespread or prevalent as distinguished from universal; as a *general* practice; *general* rain fall." *Funk & Wagnalls New Standard Dictionary*, 1935.

Yet even according to Public Counsel, all the Board has ever decided on this question is that it will not *usually* adjust rates for periods prior to the date of the filing of a petition for increased mail compensation. An examination of the facts involved in the cases considered by the Board establishes exactly that point, and nothing more.

One of the excepted situations was that involved in the Western Air Lines Mail Rate case which Public Counsel cite with approval. That case seems very much in point because it involved, as this case does, the inauguration of service on a new route. In the Western case, the carrier commenced service over route 52 on June 12, 1941, before a mail rate had been fixed for the route; in the present situation TWA commenced scheduled service on February 5, 1946 over a new route, its international operation, before a mail rate was fixed for that route. In the Western case the Board *reviewed the rates for Western's entire system operations*, including the new route, from June 12, 1941 on, saying:

"In the absence of *like unusual circumstances* the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order." (Italics supplied)

This language seems clear enough. The Board indicated that it would review rates prior to the filing of a petition in any case where "like unusual circumstances" exist, or to rephrase the words: in any case where unusual circumstances "likewise" exist. However, for some unexplained reason, Public Counsel attempt to establish that when the Board said "like unusual circumstances" it meant the "*same* circumstance": namely, a case where a carrier has initiated service on a new route prior to the date a mail petition is filed. Thus on page 6 of their motion Public Counsel state: "The Western case does not stand for any principle that retroactive mail pay adjustment will be made in cases of unusual circumstances, but only that such adjustment may be considered under 'like' circumstances." The Board

will recognize that this misquotation by Public Counsel of the language of the Board deals high-handedly with the grammar of the phrase. Omitting the word "unusual" has the effect of changing "like" from an adverb modifying "unusual" to an adjective modifying "circumstances", and constitutes an unjustified distortion of the plain reading of the phrase. It is submitted that if the Board had meant to say "like circumstances", it would have done so, but the Board did not; it said under "like unusual circumstances". The TWA situation, "like" that involved in the Western case, is one of unusual circumstances, and retroactive adjustment should be authorized.

However, even if the Board in the Western Air Lines Mail Rate Case had used the words the "same circumstances", or had otherwise specifically said that it would review rates prior to the filing of a petition *only* in a case where a carrier has initiated service on a new route prior to such filing, the TWA petition meets that test also. As stated above, TWA commenced operations under its new international certificate on February 5, 1946. Consequently even under the theory of the Western dicta as most strictly interpreted by Public Counsel the Board would be required to review the rate for TWA's entire system, including its domestic division, as far back as February 5, 1946. To repeat, in the Western case, the Board reviewed its rates for the entire system beginning with the date service commenced on the one new route. In view of the fact that from this point of view the TWA situation presents exactly the same circumstances as in the Western case, cited by Public Counsel with approval, we are unable to make any sense out of Public Counsel's motion.

There are still other instances in which the Board without even a discussion of the point, has made rates of compensation retroactive to a date prior to the filing of a petition. In a recent case involving Northeast Airlines the Board set a new rate for route 27 beginning May 1, 1945, although a proceeding relative to the rate for route 27 was not initiated until June 20, 1945.

In the Northeast case the effective date fixed by the Board for the revised rate on route 27 (May 1, 1945) was the date Northeast inaugurated service on its new route 65. If the retroactive feature in the Northeast case turns on that point, then we remind the Board of the fact that any such theory applicable to the Northeast case requires the Board to adjust the rate for TWA's domestic routes at least as far back as February 5, 1946, the date TWA commenced scheduled service on its new international route.*

In attempting to prove the point they urge, Public Counsel have relied wholly on the seven cases in which the Board has refused to make increased mail compensation effective prior to the date of filing of the application, quoting at length from two of them. Unfortunately, however, they have failed to include in these quotations the portions of the Board's decisions explaining the reason for applying this rule in the ordinary case. Immediately preceding the two full paragraphs quoted by Public Counsel at the top of page 3 of their motion, the Board in its decision in the Braniff Mail Rate Case (3 C. A. B. 633 at 636) stated:

"The Board has previously recognized that the Act places upon it a duty to maintain air mail rates at such level of fairness and reasonableness as will provide *earnings, which, when averaged over a reasonably extended time, will permit the fulfillment of the statutory objectives*, especially those stated in sections 2 and 406(b). This does not mean, however, that the earnings contemplated by the statute shall be reasonable during every particular period of time in which they are in effect. The fluctuations of traffic and revenue which characterize the airline industry strongly suggest the contrary. The earnings may in a limited period represent more or less than a reasonable profit; neverthe-

* In *Transcontinental & Western Air, Inc. Mail Rates*, 4 C. A. B. 139, the Board reviewed TWA rates *for its entire system* beginning March 1, 1941, even though the carrier's petition filed on March 13, 1941 requested that a rate be fixed on only one of TWA's routes, and inquiry as to the other four routes was not opened by Board action until August 13, 1941.

less, *the rates may still be reasonable if the average earnings over a reasonably extended period reach a fair level.*

"In fixing a rate for the future, however, we must
28 necessarily consider the results under existing rates during the past, and whether there be a deficiency, a just profit, or an excess profit, we look at the results for guidance in redetermining the rate. But, even so, *we must necessarily look at a sufficiently long period to reach a judgment as to a reasonable rate for the future.*" (Italics supplied)

It is clear from this language that the Board recognized that in the usual situation, losses incurred prior to the date of filing a petition can be offset by the profits resulting from future rates. Ordinarily, the condition complained of is occasioned by a minor fall-off in the carrier's earnings as a result of ordinary operating conditions. Each of the seven cases relied on by Public Counsel is exactly this type. All but one of these involved the period immediately prior to Pearl Harbor, when a moderate recession was encountered, whereas the opinions of the Board in these cases denying retroactive adjustment, were rendered some months later when all of the air carriers were experiencing a definite improvement in earnings.*

Consequently all the Board has so far decided is that in the ordinary case the Board will not adjust the carrier's losses prior to the filing of the petition because in the ordinary case losses in such periods can be easily recouped out of profits in later periods or out of other operations. In such a situation, rates over an extended period, looked at as an average, can be fair and reasonable and the Board will thereby have met its obligations under the Civil Aeronautics Act and the Constitution.

The instant proceeding, however, does not represent a case of that type. During 1946 TWA was struck with a

* The seventh case involved mail compensation on Pan American's Alaskan operations for a period during which the Board specifically found large profits on other Pan American divisions, 6 C.A.B. 61 (1944).

series of disasters that seriously crippled the Company. They were not of the usual type and they were of such magnitude as to make it impossible for the carrier to recoup the losses out of future earnings. The Civil Aeronautics
29 Board has followed the policy of providing uniform rates for the larger carriers, and since competition for mail between these carriers exists at all major points, uniform rates are highly desirable. Thus there is no possibility that any future rate set for the transportation of mail by TWA would provide fair and reasonable compensation over any reasonable period which includes the year 1946.

Section 406(b) of the Act provides that in fixing fair and reasonable rates of compensation the Board shall consider conditions peculiar "to the particular air carrier or class of air carriers" involved. Obviously in the present instance the Board considered conditions peculiar to the classes of air carriers involved by providing the uniform rate of 45 cents a ton mile for all of the major carriers. Just as obviously, the Board did not consider conditions peculiar to this "particular air carrier" because it did not know at the time the rate was fixed that TWA, unlike every other domestic air carrier, was going to have its planes grounded and its operations closed down by a pilots' strike. There are two possible ways of handling a situation of this kind. One is by a recognition of obligations imposed by statute in the public interest and the other is to follow Public Counsel's mechanical rule regardless of the effect that it has on the air transportation system of the United States. In this case there is no choice.

III. Principles of Justice Require an Increase in TWA's Rates Since January 1, 1946.

Even if we should assume for the sake of argument that the Civil Aeronautics Act and applicable constitutional provisions give the Board complete discretion to adjust TWA rates for 1946 or to deny such an adjustment, as the Board might deem appropriate, a denial would be contrary

to good conscience. A holding that the mere act of filing a formal petition shall determine the right to a fair
30 and reasonable rate of compensation, is not only inequitable, but is also unsound as a matter of administrative procedure.

Under the rule as the Public Counsel would have it, the Board would prefer the carrier who runs whining to the Board with a mail rate petition at the first sign of possible injury. Such a carrier would be assured of his right of adjustment. But by the same token, any carrier that tried to work out its troubles and deferred filing a petition in the hope that Government relief would be obviated by self-help, would be severely penalized. A policy of absolutely refusing any retroactive adjustments under any circumstances whether unusual or not, places a premium on seeking Government assistance at the first opportunity. It would make it essential that every carrier file an application with the Board on the happening or prediction of every unfavorable event, and more probably, the maintenance of petitions on file at all times as a safety measure.

Furthermore, two carriers affected by exactly the same circumstance and to exactly the same extent would be treated differently under the policy espoused by Public Counsel if one had a petition on file at the time while the other did not; yet both are operating under the same statute which provides that both shall have "fair and reasonable compensation"!

The unfairness of any such discrimination is obvious. It is equally apparent that the position urged by Public Counsel would tend to make carriers less likely to struggle against adversity before seeking Government aid and therefore it is unsound administratively.

The facts underlying TWA's losses also support the position that equity demands a review of TWA's rates for 1946.
The grounding of the Constellations was occasioned
31 by events beyond the control of TWA, and seriously injured TWA alone of all domestic airlines. In a

recent statement to the House Interstate and Foreign Commerce Committee Mr. William A. M. Burden, Assistant Secretary of Commerce, stated:

". . . The grounding action took place after a fire which occurred in one of the three aircraft during a training flight —not one carrying passengers. A number of engine (induction system) fires had occurred in Constellations many months previously and although we had taken corrective action which we believed had eliminated the cause of fires, we took the dramatic action of grounding the airplane pending assurance that an engine fire was not involved in the Constellation training accident.

"Investigation revealed that the source of the trouble was not an engine fire but a short circuit that caused overheating of an electrical fitting. Incidentally in the final accident report the CAB criticized the CAA inspection service for not ascertaining the defects of this fitting earlier—a clear indication that the Board does not hesitate to criticize the CAA in its reports despite the fact that no independent safety Board exists."*

The publication in which the foregoing appeared went on to say:

"Burden said he felt it was only fair to say that the grounding action and resultant publicity has worked an undue hardship on the Constellation, without question one of the world's outstanding transports. Modifications made as a result of grounding undoubtedly have made the Constellation the most advanced airplane of its class in service with respect to safety, and the principles developed from these modifications are now required for all comparable four-engine aircraft, Burden stated."*

Certainly it would be unconscionable to suggest that TWA should be called upon to bear alone the cost of this incident and of the resulting modifications that benefitted the entire industry.

* American Aviation Daily, February 11, 1947.

Following the Constellation grounding, TWA was hit by a strike of all its pilots. The strike resulted directly from the adoption by TWA of a pay scale recommended by an Emergency Board of three outstanding men appointed by President Truman under section 10 of the Railway Labor Act. There is no higher authority under that Act for the determination of labor disputes.

Thus, in essence, the two principal unusual troubles
32 TWA encountered during 1946 were the result of its reliance on Government action. It is hardly equitable that the same Government should deny TWA some relief from the losses so occasioned.

IV. Miscellaneous Arguments of Public Counsel.

Public Counsel have discussed neither the applicable principles of administrative law nor the particular statutory provision relating to their motion, but have conjured up all sorts of theoretical arguments against the principle of retroactive adjustments. One of these is that it would cause carriers to become inefficient and uneconomical. Why this is so, Public Counsel do not fully explain, nor do they explain why the *act of filing a petition*, Public Counsel's sine qua non of rate-making, should not stimulate carriers to be even more inefficient and uneconomical thereafter on the assurance that they then are surely taken care of even under Public Counsel's theories. The answer, of course, is that under section 406(b) the Board would disallow items attributable to inefficiency or uneconomy regardless of when they occur.

Public Counsel also throw in the usual Pandora's Box argument—if the Board should grant TWA's petition; it would be flooded with countless others, all of which it would have to grant. Yet it is perfectly obvious that no one urges that retroactive adjustments are justifiable in every case, but only in those unusual circumstances where adjustment is necessary to make rates fair and reasonable over an extended period. The TWA situation has come up only

once since the Civil Aeronautics Act was passed, indeed, only once in the entire history of air transportation in this country—it is hard to conceive that fair treatment in this case will mean a flood of other petitions.

As another argument, Public Counsel urge that TWA is entitled to no relief because the Board denied National Airlines relief for losses due to its accidents and failure to maintain CAA standards. The facts are obviously different, but this argument of Public Counsel serves to highlight the vicious nature of their motion—they insist that TWA be denied the right to a hearing to establish facts on which the Board can rule. Public Counsel could hardly be less deferential to the right of fair trial.

In essence, the position urged by Public Counsel would mean that the Board will always have to fix a rate by guesswork hoping that it will be able to anticipate unusual future occurrences during the period the rate is in effect in order to carry out its obligation under the statute to provide a fair and reasonable rate adequate "to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In other words, Public Counsel contend that in fixing the rate for the transportation of mail over the TWA routes in Docket No. 1700, in October 1945 the Board should have anticipated that on July 11, 1946 the Constellations were going to be grounded; that for a period of two months they would be wholly out of service; and that for several months thereafter they would be returned to service only gradually as modifications were completed. Furthermore, Public Counsel would require the Board to have anticipated that before all of the Constellations got back into service the entire operations of TWA would be shut down by a pilots' strike beginning on October 21, 1946 and ending on November 16, 1946. The rate-making process urged by Public

Counsel means that the Board would be powerless to protect an air carrier against unforeseen catastrophes. Heretofore, everyone in the air transportation industry has been entitled to believe that with "honest, economical and efficient management" it will have the backing of the Civil Aeronautics Board whose obligation it is to maintain air transportation in the interest of the commerce of the United States, the Postal Service and the national defense. Public Counsel maintain, however, that the commerce of the United States, the Postal Service and the national defense have nothing to do with the question. Principles of rate-making all depend on what time a particular paper called a petition is filed in a certain office of the Civil Aeronautics Board.*

Section 406(c) requires that any petition for fixing fair and reasonable rates shall include a statement of the rate the petitioner believes to be fair and reasonable. This has some meaning. Suppose TWA, as Public Counsel would require it to do, actually filed a petition for an increase in rates shortly after midnight on July 11, 1946 in order that the Board might properly consider the terrific losses resulting from the grounding of the Constellations. What possible reasonable basis could there have been to formulate such a rate? If as a result of guesswork some rate was inserted in such a petition, should it have included provision for the pilots' strike which came three months later? If not, what rate should TWA have inserted in a petition which it should have filed, according to Public Counsel, shortly after 5:00 A.M. on the morning of October 21, 1946 when the pilots went out on strike? The whole subject of

* Certainly the Board has never followed any such narrow legalistic approach. On the contrary, in *Chicago and Southern Air Lines Mail Rates*, 3 C. A. B. 161, the Board, in expressed recognition of "the paramount national needs, not only of the postal service but also of our commerce and our national defense", gave the carrier increased mail pay on its route No. 8 to cover the carrier's losses for the first three and a half months of operations on route No. 53 during which period the Post Office Department had neither dispatched mail nor designated mail schedules on route No. 53. To the same effect, see also *Delta Air Corporation Mail Rates*, 3 C. A. B. 261; *Pennsylvania-Central Airline Corp. Mail Rates*, 4 C. A. B. 22.

rate-making, according to Public Counsel, is pure "guesswork". You should never have actual facts before you; also, according to Public Counsel, if a catastrophe occurs it is in the interest of the commerce of the United States, the Postal Service and the national defense to permit the assets of a company to be dissipated until final collapse rather than to retreat from their principle that the "time stamp" on a rate application circumscribes the power of the Board to perform its obligations under the Act.

V. Conclusion.

In summary, we direct the Board's attention to the fact that the motion of Public Counsel raises only one issue to be decided at this time; namely, whether the Board will hear or refuse to hear TWA's petition. There is no issue at this time concerning the amount of additional compensation, if any, to be paid to TWA in respect of prior periods; such a determination can be made only after the hearing provided for by the Civil Aeronautics Act. However, the absolute right to such a hearing is well established by a long line of Supreme Court cases, and the motion of Public Counsel must be dismissed as frivolous.

In the event the Board has any question concerning TWA's right to the review requested in its petition, oral argument before the Board is respectfully requested.

Chadbourne, Wallace, Parke & Whiteside,
Attorneys for Transcontinental & Western Air, Inc.

Gerald B. Brophy,
George A. Spater,
Of Counsel.

37 Endorsement: Received Docket Section Jun 23 3:36 PM '47 Civil Aeronautics Board.

Amendment to Motion of Public Counsel to Dismiss Petition for Retroactive Rate

Public Counsel hereby amend their motion to dismiss the petition filed herein on March 14, 1947 by Transcontinental and Western Air, Inc. (hereinafter called TWA) insofar as such petition requests an increase in TWA's domestic mail rate prior to the date of the filing of the petition by TWA by adding to the aforesaid motion as paragraph (5) the following:

(5) Once the Board has fixed a final rate for a particular operation, which rate was accepted and has been in effect and unchallenged during a particular period of time, it has no authority to retroactively fix a different rate for the same operation during the same period of time. The Board, therefore, has no authority to grant the petition of

38 TWA, insofar as such petition requests a different final rate effective prior to the date of institution of the proceeding.

Respectfully submitted

WILLIAM C. BURT,
JEROME J. DICK,
Public Counsel.

Washington, D. C.
June 23, 1947

39 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the attached amendment of motion upon all parties appearing of record in this proceeding by mailing to each said party a copy of

said amendment of motion in a properly addressed, franked envelope.

JEROME J. DICK,
Public Counsel.

Washington, D. C.
June 23, 1947

40 **Notice of Oral Argument**

In the matter of the motion of Public Counsel for denial of the petition of Transcontinental & Western Air, Inc., under section 406 of the Civil Aeronautics Act of 1938, as amended.

Transcontinental & Western Air, Inc., having by petition filed March 14, 1947, requested the Board to fix and determine the fair and reasonable rate of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith over route 2, 38, 44, and 58; and

Public Counsel, by motion filed May 27, 1947, having moved to dismiss the petition, to which motion Transcontinental & Western Air, Inc., on June 13, 1947, filed an answer requesting oral argument before the Board;

Notice is hereby given, pursuant to the Civil Aeronautics Act of 1938, as amended, that oral argument in the above proceeding, with respect to the pleadings above referred to, is assigned to be held on July 16, 1947, 10 a.m., daylight saving time, in Room 5042 Commerce Bldg., 14th St. and Constitution Ave., N. W., Washington, D. C., before the Board.

Dated at Washington, D. C., June 30, 1947.

By the Civil Aeronautics Board:

S/ M. C. MULLIGAN,
Secretary.

(Seal)

41 **Service of Notice of Oral Argument**

Registered:

T. W. A. Att: Secretary, 101 W. 11th St., Kansas City 6, Mo.

Regular:

C. E. Fleming, c/o T. W. A., Hanger #2, Washington National Airport, Washington, D. C.
George A. Spater, Chadbourne, Wallace, Parke, Whiteside, 25 Broadway, New York, N. Y.
James K. Crimmins, Chadbourne, Wallace, etc., 25 Broadway, New York, N. Y.
Robert Sullivan, 1209 Tower Bldg., Washington, D. C.

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42 Endorsement: Received Docket Section Jul 11 4:29 PM '47 Civil Aeronautics Board.

Answer of the Postmaster General in Support of Public Counsel's Motion to Dismiss Petition

To The Civil Aeronautics Board:

The Postmaster General answers and supports the motion of public counsel which seeks the dismissal of that part of the petition of Transcontinental and Western Air, Inc., which requests an increase in its mail compensation effective as of January 1, 1946. In support of public counsel's motion the Postmaster General states as follows:

1. The Civil Aeronautics Board is not authorized by the Civil Aeronautics Act of 1938, as amended, to fix a retroactive rate.

2. That it is contrary to the long and well established policy of the Civil Aeronautics Board to adjust or fix rates of compensation for the transportation of mail for a period during which no rate proceeding is pending.

43 Frank J. Delany, Solicitor of the Post Office Department, or his representative, will present the arguments of the Postmaster General in support of the reasons above specified at the time public counsel's motion is argued. The time to be consumed in oral argument will be governed by the extent to which public counsel covers adequately the law with respect to the above reasons for dismissing petitioner's petition.

Respectfully submitted,

FRANK J. DELANY,
Solicitor of the Post Office Department,
Washington, D. C.

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EXCERPTS FROM ORAL ARGUMENT BEFORE CIVIL AERONAUTICS BOARD, JULY 16, 1947.

83 **Oral Argument by Gerald Brophy on Behalf of TWA**

Mr. Brophy: Mr. Chairman and members of the Board. On March 14, 1947, TWA filed two petitions for a review of the mail rates applicable to its entire system. The first of these is a petition for an order seeking an increase in the temporary rate of compensation for the transportation of mail on its foreign routes, effective February 5, 1946, the date of commencement of service over the foreign routes.

The second petition requests an increase in the rate of compensation for transporting the mail on all of its domestic routes, effective January 1, 1946, the date as of which the rate currently being paid to the company allegedly became unfair and unreasonable.

In both petitions the carrier pleaded for expedited action because of matters of urgency, peculiar to it, of which the members of the Board and everyone connected with the air transport industry are well aware.

By motion dated May 27, 1947, Mr. Burt sought an order denying the petition relating to the domestic routes, insofar as it requests an increase in the rate of compensation
84 as of a date prior to the date of the filing of the petition by TWA. The grounds for the motion were based solely on questions of broad general policy. That motion was wholly defective. We pointed out in our answer to the motion, dated June 11, 1947, that where an administrative agency has jurisdiction over a particular matter, upon which a party is entitled to notice and hearing, it cannot refuse to assume jurisdiction and dismiss or reject a petition without hearing the facts and arriving at a decision based thereon. That, of course, is fundamental and we cited in our answer Supreme Court cases to which many more could be added.

Undaunted, Mr. Burt after ten or eleven days of reflection filed an amendment to his motion, this time requesting dismissal of TWA's petition insofar as it requests an increase on the domestic routes, prior to the date of filing, on the ground that the Board does not have the authority to grant a different rate from that currently being paid, effective prior to the date of the institution of the proceeding.

Thus the only reason why we are here today is because your power is contested. We are not here to determine whether the Board should, as a matter of policy, authorize a change in rates effective prior to the filing of a petition by the carrier. That is a question upon which all parties in interest are entitled to produce evidence at a hearing, on the basis of which you may make your policy decision. But we cannot be denied a hearing on this and all other relevant facts if you have jurisdiction over the sub-
85 ject matter of this petition.

It is of no consequence whether you choose to solve this question by looking merely at the specific language of Section 406 of the Act or whether you choose to consider it in the light of the Act as a whole and your responsibilities thereunder to the air transport industry and to the country. The answer is the same no matter which course you take in resolving this problem.

I believe it is a fair observation that Mr. Burt regards this as an academic question based purely on the language of Section 406 and for that matter only on Section 406 (a) of the Act without regard to your obligations under Section 406 (b) or your responsibilities in upholding the public interest as defined in Section 2.

I would like to show first how you cannot possibly perform your functions under the Act if you accept this narrow view.

Chairman Landis: Before you go into that, Mr. Brophy, may I get this position clear in my mind. That is in the nature really of a demurrer to your petition and consequently as a matter of pleading, we should take as true your statements, your allegations that are contained in that petition, that the rate existing rate was unfair and unreasonable from January 1, 1946 on, and that is the way we should approach this case.

Mr. Brophy: Yes, from a proceeding pleading standpoint, yes.

Mr. Ryan: This then fully satisfied your point as to the hearing—this oral argument upon the motion.

86 Mr. Brophy: Oh, no, not by any means.

Mr. Ryan: That is what I wanted to get.

Chairman Landis: I understood you whittled it down to the pure legal question and it is a pure legal question and it is in effect a motion to dismiss because of the—

Mr. Brophy: But we are entitled to a hearing on the whole petition.

Chairman Landis: I just wanted to get your position.

Mr. Brophy: For the last nine years everyone in the country has believed that the Civil Aeronautics Board has

been vested with all of the means necessary, in the public interest, for the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense. That is your mandate from the Congress.

In order to discharge this responsibility you have been given the power to administer the subsidy provided by the Act if subsidy becomes necessary to achieve the objectives of the Act. More than that, you have been told in Section 406 (b) that in determining the rate of mail compensation in each case you shall take into consideration the need of each carrier for compensation for the transportation of the mail sufficient to insure the performance of service, and, together with all other revenue of the air carrier, to enable it "under honest, economical and efficient management" to maintain and continue the development of air transportation to the extent and of the character and quality
87 required for the commerce of the United States, the Postal Service and the national defense.

There is not a single word of limitation on your power in Section 406 either as to the amount of mail compensation or the period for which it may be paid. In fact, there is no limitation of any kind on your powers, except that you must only give to the carrier a rate which will enable him to operate properly under "honest, economical and efficient management". Therefore, we must not lose sight of the fact that we are dealing with a subsidy statute not a rate making statute.

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115 The sole question involved here today relates to power and not policy or discretion. You are not called upon to decide today whether TWA should have filed a rate petition earlier than it did or whether the items for which they seek reimbursement are just or not. These are questions which will be resolved at the hearing on
116 the full petition and you cannot decide as a matter

of policy whether you should exercise your power until the last bit of evidence in the entire case has been submitted and the last words of argument have been presented before you. You cannot segregate issues in a matter such as this and say in advance that the evidence which would be material on this question can be delimited or circumscribed.

You cannot adopt a hard and fast rule of policy that will be applicable to all cases because the facts have varied in the past and will continue to vary in a world of changing conditions.

Just as you found it proper, as a matter of policy, to award retroactive pay to the date of commencement of operations on a single new route, just as you found it proper, as a matter of policy, to award retroactive pay on old routes to the date of inauguration of service on a new route which came into a particular system, so also may you find that your discretion should likewise be exercised in a case involving an unforeseen and unpredictable catastrophe the duration and effect of which could never be known until it had run its full course. So also may you find that a host of other circumstances merit the exercise of your discretion. The important thing is that you are masters of your discretion and the mere recognition of your power does not require you to exercise it except in proper cases.

The rate of compensation for the transportation of the mail on TWA's domestic routes was fixed by order
117 of the Board in Docket No. 1700, dated October 26, 1945, effective January 1, 1945.

In November 1945, the first full month following the decision, TWA lost money. I am at a loss to find the profits that Mr. Burt referred to that accrued to TWA after the decision.

In December 1945, TWA lost more money. Nevertheless, in justice to any mail rate, it should be tried out over a sufficient period of time to be able to tell whether it results

in fair and reasonable compensation under honest, economical and efficient management or whether it is wholly unreasonable. Therefore, I don't think they should have filed an application for a revision of the rate because of the losses in November and December, nor do I think it was incumbent upon the Board for that matter, under Section 406 upon its own initiative or upon the Postmaster General also under Section 406 to ask for a review of the rates which thus far were nevertheless inadequate to provide over-all compensation which Section 406 contemplates.

Mr. Lee: If the carrier is guilty of being too slow on the uptake, does the Board then have the duty of opening the case on its own initiative and fixing a fair and reasonable rate?

Mr. Brophy: The Board has the power to do it. The Board, I don't think has the duty.

Mr. Lee: It would have the duty if it was impairing the carrier, wouldn't it?

Mr. Brophy: Most certainly. It would also have the duty any time the Board wants to look at the financial condition or the rates being paid to a particular carrier, they would have the power to open it up.

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Mr. Lee: They have the power under your theory announced a while ago, the Board has the duty also to use its power of initiating rate, a new rate in order to carry out the purposes of the Act as set forth in Section 2.

Mr. Brophy: I think there are situations when the Board might have that obligation in order to perform its responsibilities under the Act, Mr. Lee. All I am saying is that you are certainly not precluded from doing it whether you want rates to be increased or decreased. I don't think you can sit back and let a carrier dissipate its operations to the point where the development of air transportation system contemplated by the Act may be retarded.

In those situations I think it would be your duty, but the point again that I am emphasizing is what your power is, how you exercise it based on all the facts.

Mr. Lee: Wouldn't any substantial loss impair the carrier in performing its duty and service?

Mr. Brophy: It depends on its overall financial situation. Merely a loss over a given period of time would not necessarily mean that the carrier or the Board or the Postmaster General must become alarmed and initiate a rate proceeding.

Chairman Landis: But on the basis of the Western and the Northeast cases what you are really arguing is that the category of the grounding of Constellations is at least comparable to the category of opening up a new
110 route.

Mr. Brophy: Exactly.

Mr. Ryan: At any rate, the question whether the petitioner here has been guilty in no way affects the Board's legal power.

Mr. Brophy: None whatsoever.

Mr. Ryan: I take it you were discussing it not because it was relevant but some of us raised the question as to why the carrier hadn't filed suit.

Mr. Brophy: That is right. In January 1946 TWA lost even more money and this is when all of the airlines in the country were becoming seriously involved.

Then on February 5, 1946, operations were started on the newest addition to the TWA system, the foreign routes. On that date, as a result of everything the Board has ever said before or since, the rates applicable to the entire TWA system, domestic and foreign, were open to review.

There has not yet been a formal review of TWA's international operations. The company has only a temporary rate set in October 1946 which did not take into account the propriety of the allocation of expenses between the domestic and foreign routes of TWA but was merely a device, which is still in effect, for providing some money to the international carriers pending the establishment of a permanent rate.

Nevertheless, despite the fact that a rate had not yet been fixed for the international division, beginning in March 1946 losses in TWA's operations began to decline.

Although losses still were suffered during April and
120 May they were still declining. In June the turn came and operations were profitable.

On July 11, 1946 the first catastrophe occurred with the grounding of the Constellations.

Suppose, at that time, service on the international routes had not been inaugurated and suppose also that the Board had not previously said that, as a matter of policy, you would not adjust rates effective prior to the initiation of proceedings, which you have never said. In that event, Mr. Burt maintains that you have absolutely no power to consider whether TWA should be compensated for the dire results which followed because at 12:01 A.M. on July 11 somebody wasn't at your doorstep with a paper called a petition for an increase in rates based upon what might happen depending upon the duration of the Constellation grounding and the effect that it would have on general passenger acceptance. But remember, at that time the entire TWA system rates were open to review by your own pronouncements by reason of the inauguration of service on the new international routes commencing February 5. Moreover, in the entire history of air transportation in the United States, there had never been a more "unusual circumstance" affecting any air carrier or group of carriers than the grounding of the Constellation and the subsequent pilots' strike.

To have filed a petition on July 11, 1946 based upon the catastrophe resulting from the Constellation grounding would have disregarded and flaunted Section 406 (c) which requires that any petition shall include a statement of the

rate the petitioner believes to be fair and reason-
121 able. No one could know what rate was fair and reasonable until the Constellation ultimately got back in service and some knowledge was had of the dam-

age done in the public's estimation of the safety of that airplane. Section 406 (c) is in specific language and means something. Surely Mr. Burt does not mean that this language should be disregarded although he does want you to give effect, in your construction of Section 406 (a), to language which isn't even in the Act. But events made such an appraisal of a fair and reasonable rate impossible, at that time, because before all of TWA's Constellations were back in service the pilots' strike occurred as a result of which TWA's operations ceased entirely throughout the world. There are two things that we should keep in mind in connection with these two catastrophes. First, that the grounding of the Constellation occurred as a result of the Governmental order issued by the Civil Aeronautics Administration and the strike occurred because TWA put into effect the rates of pay recommended by the highest Governmental tribunal on labor matters under the Railway Labor Act, the special fact finding board appointed by President Truman, after every procedural step under the Act had been exhausted.

I refer to the fact that the Constellations were grounded by order of the Civil Aeronautics Administration on July 11th because at that time the Civil Aeronautics Board, as well as the carrier, could not possibly have anticipated the duration of the grounding or the extent of the damage that the carriers affected would suffer. If you had, as a consequence issued an order in anticipation of the effect
122 of the grounding, you would have been exercising the discretion or the power in discretion that I think you have under the Act.

Well, despite the fact that June of 1946 was a good month, the grounding of the Constellations and the pilots' strike ruined the balance of the year. With the annual audit completed and the internal situation in TWA somewhat resolved, it was possible to appraise the loss resulting from the grounding and the pilots' strike and thus form some basis for a petition for review of the rates, since ac-

tion on the permanent rate for the foreign routes was something that apparently would not come up for some time. Actually the figures showed that the losses during 1946 resulting from the grounding and the strike alone exceeded ten million dollars (10,000,000) and it was possible to formulate some idea of what a fair and reasonable rate would be in compliance with Section 406 (c) of the Act. Consequently, the petition for a revision of the domestic rate, effective as of January 1, 1946, the date as of which we believe we can establish it to be unfair and unreasonable and the petition for an increase in the temporary rate being paid for the transportation of mail on the foreign routes were filed on March 14, 1947.

There is no such thing as an estoppel which would deprive the Board of its jurisdiction on its own initiative, or upon application of the Postmaster General, or upon application of an air carrier, to review rates over a past period, to determine new rates and to make such rates effective from such date as it shall determine to be proper.

The carrier is entitled to fair and reasonable rates
123 of compensation for the transportation of the mail
and sufficient to enable it to carry out its obligations, and the Government is obligated to pay fair and reasonable rates in order to accomplish that purpose.

The very idea of estoppel depriving the Board of its jurisdiction is negated by the provision of Section 406 (a) which empowers and directs the Board to fix fair and reasonable rates on its own initiative. This does not mean that the power and responsibility of the Board to initiative proceedings is limited to a proceeding looking toward the reduction of a rate because the ultimate responsibility of the Board is to encourage and develop a system of air transportation contemplated by the Act.

Moreover, in this case particularly, the carrier had before it, on which to rely, the past decisions of the Board that with the establishment of a new route the rates of the entire system are subject to review and the declarations by

the Board that it is policy, and policy alone, which has determined their decisions in previous cases.

The question has been raised as to the constitutionality of any action by the Board in refusing to adjust unfair and unreasonable rates which became such prior to the initiation of proceedings. I personally believe that the mere analysis of the Act itself reveals arguments so overwhelming that the constitutional point can be considered as cumulative rather than the main support of our position.

However, I believe the constitutional point is absolutely sound. TWA had a contract with the Government, under the Air Mail Act of 1934, for the transportation of
124 the mail and agreed also to furnish passenger and express service in connection therewith. Under that contract it could abandon its responsibilities without penalty on sixty days' notice. The Civil Aeronautics Act held out to it the promise that if it assumed the obligations of a certificate of convenience and necessity it would receive fair and reasonable compensation in accordance with the standards prescribed in Section 406 (b). Moreover, in giving up a contract from which it could have withdrawn voluntarily on sixty days' notice, the carrier assumed the obligations of a certificate from which it cannot withdraw unless permitted by the Board under Section 401 (k) of the Act.

In fact, any carrier which assumes the responsibilities of a certificate does so on the promise of the benefits of Section 406 (b) and these cannot be denied the carrier as a matter of law.

It is of no consequence that you may call Section 406 (b) a subsidy. It is part of the promise to the carrier for performing its obligations under honest, economical and efficient management. The decision of the Supreme Court in United States v. Northern Pacific Railway Co., 256 U. S. 51 (1921) establishes this beyond question. In this case, the court held that a grant of lands by Act of Congress to the railroad in exchange for its agreement to extend its

lines was a promise binding on the government and the lands so promised could not be diverted by the government to other uses. The court said that "Such rights are within the protection of the due process of law clause of the Constitution."

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133 I would like to comment if I may, on the remark made in the early part of Mr. Burt's argument. I think you will agree this is a purely jurisdictional question. After the motion was made, Mr. Burt made what I thought was a frantic attempt to get us into some kind of a hearing on a limited question as to whether the Board should exercise its policy in this matter.

There is no such thing as a limited hearing on this question because you can't decide this. If you agree that you have the power and it is a matter of discretion, then everything that goes into a rate case is material and you can't pick out an issue here and one there. The motion was not our motion; it was his, and frankly, I don't think it ever should have been made, but that is neither here nor there. I was a little disturbed if not annoyed at the comment that full and fair opportunity had been given us for a hearing. That is not so.

Mr. Ryan: Are you referring to this last motion?

Mr. Brophy: I am referring to the motion that raised first the policy question and as amended, to raise the jurisdictional question.

Mr. Ryan: So that your position procedurally would be if you went ahead after this motion could only be disposed of—I mean the amendment to this motion is the only thing to be disposed of at this stage so then you would
134 have left the rest of the motion, the motion as to the exercise of policy and also the merits of the rate proposed.

Mr. Brophy: I think the question of the motion relating to policy has to be dismissed as a matter of law because

we are entitled to a hearing and that involves the Morgan Case and everything else and cases long before the Morgan case.

Mr. Ryan: I agree with you personally that he can't dispose of that policy motion in that case [instance].

Mr. Brophy: And you can't do it in any small hearing because there are no issues to segregate. Everything we say on that case is bearing on the issue whether you should exercise your discretion.

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135 Mr. Ryan: You referred to the Constitutional question. Is it your position that the Constitutional question involved here is one of substantive confiscation or is it the question of the denial of the carrier of the benefits prescribed by the Statute? In other words, the
136 Board denied due process by not adhering to the provisions of the Statute.

Mr. Brophy: It is the latter.

Chairman Landis: I have difficulty in reconciling that point of view if you put it on a Constitutional basis and then say—well we have the discretion to go in. If it is on a Constitutional basis, you almost eliminate discretion on our part. If you establish the Constitutional basis, then it becomes almost mandatory on your part to go in.

Mr. Brophy: Remember, I am speaking to this motion, Mr. Chairman, and this motion—

Chairman Landis: I recognize you didn't drive the Constitutional point. I always have had difficulty in seeing how you can have on one side a flexible policy and on the other hand an inflexible Constitutional obligation. The two don't jibe.

Mr. Ryan: Would the question of the Constitutional right to look a gift horse in the mouth be involved here also? That is, whether or not you can have a Constitutional question where a subsidy is involved.

Mr. Brophy: This isn't a gift horse, Mr. Ryan. We undertook the obligations under the Act and were promised

benefits of the Act that you have available to give us and that is not looking a gift horse in the mouth and I think the Supreme Court case that I cited shows that very clearly.

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140 **Oral Argument of Roy C. Frank, on Behalf of the Post Office Department**

Mr. Frank: Mr. Chairman and members of the Board, the Post Office Department does not intend to make a legal argument at this time. The legal points have been adequately covered by public counsel and by Mr. Brophy, representing TWA. The Post Office Department does wish to state its position, however.

We would like to see the motion granted. We feel that the Board does not have the legal authority under the Act to take the action that TWA requests. We would like to concur in all of the legal arguments made by public counsel. We agree with the points made by him, and we would like to adopt as far as we can the legal argument made by him as our argument.

The Post Office Department does have certain practical difficulties in this matter, that I believe the Board ought to take into consideration, not in determining what the policy should be, but in determining what the law means. I can see a difference between practical effects that go to policy questions, and practical effects of a law that goes to interpretation of the law.

I believe the rule is that in construing ambiguous law that the court, or in this case the Board, has to de-
141 termine and has to decide the ambiguity in such a way that the law will be given its practical effect and will not lead into any administrative or practical difficulties.

A construction here as contended by TWA will lead into a number of practical administrative difficulties not only for this Board, but also for Congress and for the Post Office Department, particularly the Post Office Department.

If the Board should decide that it has the power to fix rates previous to the date of the filing of the petition, it will mean that the Board will never grant a final rate. Every rate that the Board grants will be a temporary rate. And in effect, after a certain period of time has elapsed, whether it be six months or a year or two years, depending upon when the Board on its own initiative opens up the question, or a carrier petition, or the Post Office Department comes into the case, the Board will then have to determine what the rate should have been for that particular preceding period of time. That is the only way that the Board then will ever be able to establish a final rate. I may say even that rate will not become final because there may be certain circumstances overlooked at the time of that hearing, that the carrier or the Department or the Board could show, and the further rate would be established.

The practical difficulties confronting the Post Office Department and Congress in this matter would be in connection with then Budgetary appropriations. It would be impossible for the Post Office Department to approach
142 Congress and make recommendations as to what the Budget should be for any particular year. At that, the Department would have to tell Congress that we anticipate it will be so much, but we never know what air line carriers are coming in asking for additional increases of $11,000,000, $14,000,000, $20,000,000, we are only giving a guess, and that is not a very good guess. It would be worse than the guess we are giving today.

Congress at the present time is very impatient at the present system of granting temporary rates, and a year or two later granting the permanent rates as now fixed. I think that was brought out by Commissioner Branch to some extent.

I have a quotation from Committee Report No. 557 under date of June 11, 1947. I think that is the report referred to by Commissioner Branch to some extent. I would like

to read it, however, to get it into the record to show what the present indication of the Appropriation Committee in Congress is under the present system. I venture to say if the system were opened up so we could go back three or five or six or seven or eight or nine or ten years, that Congress would look with even more disfavor upon that kind of a policy.

I bring that out, gentlemen, not for any other reason except this. I think we have a right to look at the present interpretation and the present sentiment in Congress as to what Congress means by this Act, what Congress means by the language in this Act, what the standing is of our lawmakers.

143 The quotation I wanted to read is as follows: It has to do with the various items for foreign air mail transportation which total $33,000,000. The quote is as follows:

"The committee regrets exceedingly that the Post Office Department is not able to present a definite statement as to the amounts that will be involved in final settlement of these items. The Post Office Department cannot, however, make this determination until the Civil Aeronautics Board has made a determination of the amount to be allowed to the carriers. It is disconcerting, to say the least, to be faced with this situation two years after the close of fiscal year 1945. The rates covering that period are not yet determined, and the present amount is appropriated on the basis of temporary determination by the Civil Aeronautics Board. The only reason for making the appropriation is in order to make payments on account to the carriers so they may maintain service. The committee feels very strongly that the policy of the Civil Aeronautics Board in deferring rate making is entirely out of line with the necessities of the situation, and that the rates can be more readily determined with adequate safeguards for the federal treasury."

The Post Office Department, if rates could be fixed back of the date of the petition, could never close its books. It would have to keep its books open for a very indefi-
144 nite period of time. We would never know what deficit we had for the year, or what surplus, if any, we had for a particular year. We would never be able to go before Congress and state that we feel that the 5 cent rate of today should be reduced to 4 cents on the basis of the operating costs for 1947, or that the rate should be raised to 6 cents on the basis of the losses for 1947. We would have to say, "We do not know what the loss is going to be, we don't know what the profits are going to be, because in 1950 the Board can open this matter up and can state for 1947 we have to pay out another $10, $20 or $30 million." We will never know where we are at any particular time.

A further difficulty that the Post Office Department will be placed to is in the cost ascertainment procedure. The Post Office Department has built up over a period of many years a very elaborate system of cost ascertainment. That system is used in these cases. We come in, we tell the Board, and we present figures to the Board to show that in the year 1945 the cost of various services is such. The Board then relies upon those figures for 1945 in determining the rates that they will fix in the future. If the contention of TWA is accepted, it would result in that kind of a situation. The Board relying on the cost ascertainment figure for 1945 would fix rates for 1946, let us say, or 1947. In 1948 the Board would go back to 1945 and would allow another $10,000,000, which would mean that the figures that you used to fix the 1946 and 1947 rates were false figures.

Chairman Landis: I have never seen a case where
145 the Board has used the cost ascertainment figures of the Post Office.

Mr. Frank: I had assumed that a good many of the figures that we have relied upon in our exhibits and figures that we have furnished the carriers in these various cases

have been taken from our records and from our cost ascertainment figures. For example, our costs in various systems. I have been informed that, Mr. Chairman, and I believe in some cases that has been used. In fact, I believe I have seen some exhibits. I am trying to recall which ones. There has been a footnote to the effect that the exhibits were based on figures submitted by the Post Office Department, which would have to have been taken from their cost ascertainment figures. I say that as a matter of recollection and not being able to point to the specific example.

Chairman Landis: The cost ascertainment figures show this, do they not, they show the actual cost to the Post Office?

Mr. Frank: That is right.

Chairman Landis: Of carrying this mail?

Mr. Frank: That is right.

Chairman Landis: And they are worked up on the basis of your surveys every three weeks at odd intervals?

Mr. Frank: That is right.

Chairman Landis: Actually, the cost of carrying the mail, except where this Board goes into an overall service rate problem, is not of much importance in the rate
146 making picture.

Mr. Frank: Except that this Board stated in the Helicopter Case in Los Angeles, that they thought the cost was a little high, but they would give it a test.

Chairman Landis: That is right. Where the cost ascertainment figures seem to me to have great importance is not so much in the mail rate cases, mail pay cases, perhaps where they ought to have far greater emphasis than they are given by the Board at the present time is in your route cases, how much is this going to cost the government of the United States.

Mr. Frank: To get back to that, Mr. Chairman, that exactly emphasizes the point I was making, regardless of whether the cost ascertainment figures are used in route cases or rate cases, if the Board relies upon a false figure

that is furnished by cost ascertainment to establish a route, the Board is at the same disadvantage, and the carriers are at the same disadvantage as though it were used in a rate case. It does not make any difference what type of case it is used in. The mere fact that these figures can never be relied upon as being the actual cost for this particular year, because they can always be increased subsequent to the time you have used them.

Chairman Landis: I was not trying to argue with you on your point, but, rather, was perhaps indicating that the cost ascertainment figures ought to be used by the Board much more than it does.

Mr. Frank: I certainly appreciate that statement,
147 Mr. Chairman, because we contend that too.

The Post Office Department also faces a further practical difficulty. In recomputing the amounts due the carrier under any future increased rates, we would have to go back, and we would have to recompute the amounts of mails that have been carried. We would have to recompute the amounts that are due to the air carriers. It is a difficult and expensive operation. Some of these cases, I am informed, by the second assistant's office, that the basic data used is not available or in proper use in connection with the new rate. After a period of time it has been used for other purposes. It has been sent here and there and the exact figures have not been kept as a matter of permanent record.

It would appear to me that these difficulties that we would be faced with ought to be considered in connection with the determination of what Congress had in mind at the time this Act was passed. I do not think Congress had in mind that the government agency that was footing the bill, so to speak, would be placed in a position where it would never know when its liability ceased, when it would always have to keep its books open for additional costs, when it could never determine its own budgetary requirements for the carrying out of these payments at any par-

ticular time, and when generally the whole question would be left up in the air and the final rate never determined. I cannot conceive that Congress ever had that in mind.

There may be answers to the problem as to how
148 the air carriers can secure the losses that they have incurred, losses that they did not expect. I do not think we are concerned at this time as figuring out that problem. That is a bridge that we have to cross when we get to it. The only bridge we have to cross today is a bridge as to whether this Board here can make rates retroactive from the date of the petition. I think if we cross that bridge, we will be doing well and we should not worry about the future.

If there are any further questions, I would be glad to answer them if I can, if not, I have said everything that the Post Office Department wishes to say at this time.

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176 **Opinion**

E-1032
E-1033

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: Dec. 5, 1947.

Docket No. 484.

PENNSYLVANIA-CENTRAL AIRLINES CORPORATION

Docket No. 2849.

TRANSCONTINENTAL & WESTERN AIR, INC.

Decided: December 2, 1947.

Motions to dismiss mail rate petitions insofar as they request the fixing of mail rates to be effective prior to petition filing dates granted.

The Civil Aeronautics Board does not have the legal authority to fix a new rate for an operation during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding. (p. 8)

The language of section 406 of the Act is similar to that normally used in granting authority to make public utility rates which are traditionally applicable only to the future, and is almost identical with the language of the earlier mail pay acts which language has never been given the retroactive construction contended for by respondents herein. (p. 9)

Consideration of the provisions of the Civil Aeronautics Act of 1938 indicates that a major purpose thereof was the application of public utility regulatory principles to the airline industry. (p. 10)

It is firmly established law that a public utility rate deals only with the future and is not concerned with reimbursement of past losses nor recapture of past profits which have proved excessive. It offers only an opportunity to earn a fair return, and it does not guarantee that such a return will, in fact, be earned. (p. 11)

The first sentence of section 406 of the Civil Aeronautics Act is substantially identical to the related statutory enactments in the fields of railway and air carrier mail pay found in the Railway Mail Pay Act of 1916 and in the Air-
mail Acts of 1934 and 1935. None of these acts has
177 been held to confer a retroactive mail rate-fixing authority. (p. 9)

There is nothing in the legislative history of the Civil Aeronautics Act to indicate an intention that the Act contemplated a retroactive rate-making authority such as is contended for by the respondents. (p. 14)

The fact that the Board is directed in fixing mail rates to consider the need of the carrier for revenue sufficient together with all other revenue to enable it to achieve certain statutory objectives does not confer retroactive power

but merely directs the Board, in fixing a rate for any period, to consider factors not ordinarily considered by other rate making agencies. (p. 22)

The contention that such retroactive power is *essential* to carry out the purposes of the Act cannot be accepted. Such retroactvie authority would be definitely harmful in the administration of this Act and would radically change the fundamental principles upon which the Act is based. (p. 22)

Authority to reimburse for past losses would carry with it authority in the Board to recapture excessive profits. (p. 23)

Where there is no mail rate in effect for a new route the Board must consider mail pay requirements arising as a result of such new operation from the date mail service begins thereon, irrespective of the date on which mail rate proceedings are initiated. (p. 26)

While this Board has consistently recognized the developmental responsibilities placed upon it by the Civil Aeronautics Act of 1938, its administration of the mail pay provisions of the Act has uniformly recognized that basic principles of public utility rate-making apply to the fixing of mail rates. (p. 26)

In its rate decisions the Board has always assumed that risk of loss, should rates prove inadequate, would fall upon the carrier, and it has allowed a rate of return commensurate with the risks that appear to be involved. This concept of providing payment for risk in the rate of return is diametrically opposed to the principle of reimbursement for past losses. (p. 27)

178 There is no indication in the entire legislative history of, or in the Civil Aeronautics Act itself, that a guarantee of carriers against losses incurred under rates found fair and reasonable by traditional public utility rate-making procedures was intended or thought necessary to accomplish the development purposes of the Act. (p. 29).

The Western case did not hold that the Board would fix

retroactive rates in any case of unusual circumstances but only that where there is no mail rate in effect for a new route the Board will consider mail pay requirements arising as a result of such new operation from the date mail service begins thereon. This doctrine is not applicable to the petitions of TWA and PCA. (pp. 24 and 34)

Motions of Public Counsel to discuss respondents' mail rate petitions insofar as they request the fixing of mail rates to be effective prior to the filing dates of those petitions granted, and said petitions to that extent, dismissed. (p. 35)

Appearances:

Gerald B. Brophy and *George A. Spater* for Transcontinental & Western Air, Inc.

Charles H. Murchison and *Robert Hankins* for Pennsylvania-Central Airlines Corporation.

Frank J. Delaney, Roy C. Frank and *Louis J. Doyle* for the Postmaster General.

William C. Burt, Jerome J. Dick and *Robert E. Redding*, Public Counsel.

179 OPINION.

By the Board:

This opinion disposes of motions by Public Counsel in two proceedings. The first is a motion to dismiss the petition filed on January 14, 1947, by Pennsylvania-Central Airlines Corporation, hereinafter referred to as PCA, insofar as it requests the fixing of a mail rate retroactively from June 1, 1942 to January 14, 1947, the filing date of its petition. The second is a motion to dismiss the petition of Transcontinental & Western Air, Inc., hereinafter referred to as TWA, insofar as it requests the fixing of a mail rate retroactively from January 1, 1946 to March 14, 1947, the date of filing its petition.

Although the two petitions present superficial differences and although the motions were argued separately, we are of the opinion that the basic considerations applica-

ble in each case are substantially the same, and we are, therefore, disposing of both in this opinion.

The TWA petition is a simple request to fix a mail rate for its domestic operations on and after January 1, 1946. During the period between January 1, 1946 and the date of its petition it was receiving mail pay for these operations in the amount of 45 cents per ton-mile under a rate theretofore fixed by final order of the Board (Order Serial No. 4151) issued October 26, 1945.[1] Under this rate, Transcontinental & Western Air, Inc., received mail pay in the amount of approximately $3,541,000 for operations between January 1, 1946 and March 14, 1947, the period for which it here seeks additional mail pay in the amount of approximately $11,157,000.

180 PCA's petition in terms asks for reconsideration, rehearing and reargument with respect to the 60-cent per ton-mile rate fixed for its operations by Order (Serial No. 2077) issued December 16, 1942.[2] For the period June 1, 1942 to January 14, 1947, PCA requests approximately $5,000,000 mail pay in addition to approximately $1,700,000 already received for this period under that Order. Despite its form, Public Counsel considered the petition of January 14, 1947, as an original petition to fix rates on and after June 1, 1942.

Public Counsel's initial motions proceeded on the ground that the fixing of a new mail rate for a retroactive period for which a final mail rate had been in effect and unchallenged would violate a well-established policy of the Board. By subsequent amendment of his motion in each proceeding, Public Counsel questioned the Board's legal authority to fix a rate for such a past period.

[1] TWA Mail Rates, 6 C. A. B. 595 (1945). This was a service rate which was fixed at this time for each of the "Big Four": American Air, Mail Rates, 6 C. A. B. 567 (1945); Eastern A. L., Mail Rates, 6 C. A. B. 551 (1945); United A. L., Mail Rates, 6 C. A. B. 581 (1945).

[2] PCA Mail Rates, 4 C. A. B. 22 (1942). This was a service rate which was made applicable to the so-called "Little Six": Braniff Airways, Mail Rates, 4 C. A. B. 588 (1944); Chicago and Southern A. L., Mail Rates, 4 C. A. B. 529 (1943); Delta Air Corp., Mail Rates, 4 C. A. B. 501 (1943); Northwest Air, Mail Rates, 4 C. A. B. 515 (1943); Western A. L., Mail Rates, 4 C. A. B. 441 (1943).

In our opinion, the position taken by Public Counsel with respect to the nature of PCA's petition is correct. That petition must be considered as initiating a new proceeding, rather than as a continuation of the proceeding which resulted in the opinion and order of December 16, 1942. PCA relies on the following language in that opinion, as giving it a right to reconsideration upon petition filed January 14, 1947, more than four years after that order and opinion were issued:

". . . Accordingly, we shall fix rates herein to become effective June 1, 1942, with the understanding that upon respondent's request filed pursuant to rule 8 of the Rules of Practice, they will be subject to reconsideration from and after that date." (p. 22) But Rule 8,[3] referred
181 to in the opinion specifically provided that a petition for rehearing, reargument, or reconsideration was required to be filed within fifteen days of the order sought to be vacated or modified.

PCA contends that applicability of the 15-day limitation could not have been intended; that if applicable, the language accomplished nothing, since it conferred no right in addition to what PCA would have had in any event under Rule 8. This analysis fails to note the very substantial right which the language in fact conferred on PCA. In June, 1942, circumstances affecting the commercial air transport industry, and arising out of military requirements, caused the Board to adopt measures and follow procedures designed to afford the carriers partial assurance

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[3] Rule 8 of the Rules of Practice, issued April 28, 1939, and in effect December 16, 1942, provided:

"Any party may petition for rehearing, reargument or reconsideration of any final order by the Authority [Board] in a proceeding, or for further hearing before decision by the Authority [Board].

. . .

"Such petition for rehearing, reargument, or reconsideration must be filed within fifteen days after service of the order sought to be vacated or modified and shall be served by the petitioner upon all parties to the proceeding or their attorneys of record."

against substantial but unpredictable losses incident to enforced curtailment of commercial operations.[4]

182 Consistency with the announced procedures of the Board required that PCA's rate be reconsidered by the Board upon request therefor within 15 days after issuance of the Board's final rate order. By the language of the opinion, PCA had an absolute right to reconsideration of its mail rate upon request therefor filed within 15 days. This was a different and substantially greater right than that conferred by Rule 8 to petition for reconsideration, a request which might be denied in the proper exercise of the Board's discretion. Since PCA's right to reconsideration upon petition filed therefor was limited by the 15-day pro-

[4] The proceeding culminating in the rate opinion of December 16, 1942, was begun by order dated October 8, 1940. The hearing was conducted four months prior to Pearl Harbor. In May 1942, the armed forces took over a substantial portion of the planes of the domestic carriers, and severe restrictions affecting service patterns of all carriers, including PCA, were imposed. In order to protect carriers against undue losses which might be occasioned by these restrictions, we issued two general memoranda to the industry, the first on May 22, 1942, and the second on June 3, 1942. The first memorandum proposed that all rates after May 31, 1942, be temporary. This was superseded by the second memorandum, which provided that any carrier with no pending rate case could file a petition within two weeks after June 3, 1942, and such petition would be considered filed as of June 1, 1942. Should a petition be filed, it was proposed that a show cause order would issue *after* sufficient experience had been accumulated under the new service pattern, proposing a new rate back to the petition date, June 1, 1942. As to those carriers, like PCA, who had cases pending, we stated that we would proceed to fix final rates.

The proposal under the second memorandum might conceivably have been unfair to a carrier with a pending case if insufficient experience under the new service pattern had been accumulated at the time final rates were fixed for it, since any petition thereafter filed for a new rate could only result in relief from the date of the petition, and not from June 1, 1942. Under these circumstances PCA petitioned to have a temporary rate fixed for the period after June 1, 1942.

At the time the December 16, 1942 order was issued we had before us, by stipulation, the record of four months' operations under the new war service pattern. We accordingly proceeded to fix a final rate for the period after June 1, 1942, despite the petition of PCA for a temporary rate. However, to place PCA in as favorable a position as those carriers which had no case pending on June 1, 1942, we provided that PCA might have reconsideration of the final rate for the period after June 1, 1942, upon request filed under Rule 8. Under this provision, if PCA should believe that the experience upon which the post June 1, 1942 final rate was fixed did not adequately reflect the new pattern of operations, it could, if it made request therefor within 15 days, have reconsideration of that rate as of right. It was thus placed in as favorable a position as the carriers which had no petition pending on June 1, 1942, and who were given two weeks in which to petition for a new rate after June 1, 1942.

[5] See note 4, *supra*.

vision of Rule 8, its petition of January 14, 1947, must be construed as initiating a new proceeding to fix a rate for a retroactive period. It accordingly raises the same basic issues as does the TWA petition.

183 After full consideration of the Act, and of its legislative history,[6] and of the arguments of counsel on the motions, we are of the opinion that as a matter of law we do not have the authority to fix a new rate for an operation during a period in which a final rate previously fixed by us was in effect and unchallenged by the initiation of a mail rate proceeding.

Section 406 of the Act, which sets forth our mail rate-making duties and powers contains two provisions which are important in determining our authority. The first "empowers and directs" us upon our own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft." The second empowers and directs this Board "to make such rates effective from such date as it shall determine to be proper."

The respondents in effect contend that the second provision is a clear and unambiguous grant of authority to fix new rates for any retroactive period even though previously fixed final rates may have been in effect and may have constituted the basis for presumably final payment to the carrier, and that the statutory language therefore leaves

[6] In considering the legislative history we are concerned not only with the bills introduced in the 75th Congress, 3rd Session, H. R. 9738 and S. 3659 and S. 3845 (which bills were "fundamentally the same," Cong. Rec. Vol. 83, part 6, p. 6725), which became the Civil Aeronautics Act of 1938, but with two sets of earlier bills in the 1st Session of the 75th Congress, H. R. 5234, and S. 2, identical bills covering economic regulation, and H. R. 4652 and S. 1760, identical bills covering safety regulation. After extensive hearings had been held on the earlier bills which proposed to vest the regulatory power in the Interstate Commerce Commission, and before they could be brought to a vote, the later bills, embodying most of the substantive provisions of the earlier bills, but placing the regulatory power in an independent agency, were substituted therefor. The hearings on the later bills were devoted largely to the desirability of this change and must be read in connection with the history of the earlier bills to obtain a complete legislative history of the Civil Aeronautics Act of 1938.

no room for interpretation and permits no resort to
184 the help of legislative history or other aids to construction. But to whatever extent it may be necessary to establish ambiguity before properly resorting to legislative history,[7] such ambiguity is clearly present in section 406. The language of the first provision is similar to that usually used in granting public utility rate-making powers which are traditionally applicable only to the future and is almost identical to and is copied from the language of earlier mail pay acts [8] which were never given the retroactive construction contended for by the respondents herein.

The respondents' position that because of the language of the second provision, the section must be interpreted as vesting in the Board authority to reimburse every carrier in the industry to the extent to which any such carrier may in the past have realized less than a fair rate of return is so substantial a departure from any prior regulatory plan in any related field that it clearly raises the question whether the section was not intended to have a somewhat narrower meaning. Inquiry into the field of public utility regulation, into Interstate Commerce Commission decisions under closely related statutory enactments, and into legislative history [9] discloses that the Act was never in-
185 tended to vest in the Board the retroactive rate-making power urged by respondents.

Reference to the Civil Aeronautics Act of 1938 and to the legislative history which preceded its enact-

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7 "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words . . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." United States v. Dickerson, 310 U. S. 554, 562 (1940).

8 See Footnote 15, infra.

9 ". . . there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." Harrison v. Northern Trust Co., et al., 317 U. S. 476, 479 (1943). Accord: Church of the Holy Trinity v. United States, 143 U. S. 457 (1892); Texas and Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S. 197, 218 (1896); Bazley v. Commissioner of Internal Revenue, 67 S. Ct. 1489 (1947).

ment discloses that the application of public utility regulatory principles to the air line industry was the principal objective of the Congress.[10] Provision in the Act for certificates of public convenience and necessity; regulatory control over rates, fares, charges, and practices in the carriage of passengers and property as well as mail; restrictions on agreements, mergers, interlocking relationships, and acquisitions of control; requirements with respect to tariffs and numerous other traditional utility regulatory provisions demonstrate that fundamentally this Act was intended to apply public utility regulatory principles to the air line industry.

It is firmly established law that a public utility rate deals only with the future. It is not concerned with the reimbursement of past losses nor with the recapture of past profits which have proved excessive. It offers only an opportunity to earn a fair return, and it does not guarantee that such a return will, in fact, be earned. The first sentence of section 406 simply empowers and directs the Board to fix rates. In no other public utility statute has such language been construed to contemplate a retroactive rate-making authority.

In the leading case of *Galveston Electric Company* v. *City of Galveston, et al.*,[11] Justice Brandeis held that a commission is not required to capitalize past losses in the rate base to be used in fixing a future rate. In the *Geor-*
186 *gia Railway* case,[12] the utility, alleging a failure to earn a reasonable return for the past four years under commission-fixed rates, asked that such deficiency be reimbursed currently in the new rates or be capitalized. In rejecting the contention, the Federal Court said:

[10] "The bill before you is more or less the usual form of American regulation of utilities or transportation and embraces the points which are common to all such types of legislation." Gorrell, *Hearings before the House Interstate and Foreign Commerce Committee on H. R. 9738*, 75th Cong., 3rd Sess., p. 297. The legislative history is discussed hereinafter in this opinion.

[11] 258 U. S. 388 (1922).

[12] Georgia Railway and Power Company et al. v. Railroad Commission, 278 Fed. 242, 247 (N. D. Ga. 1922), affirmed 262 U. S. 625 (1923).

"A rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that no legal right exists to have disappointments or surprises in results balanced."

The doctrine was reaffirmed as recently as the *Natural Gas Pipeline* case[13] where, in denying the utility's claim to capitalize costs of maintaining excess capacity during the early period of operation, Chief Justice Stone said:

". . . . But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base. . . . The deficiency may not be thus added to the rate base, for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business."[14]

Comparable and related statutory enactments and decisions thereunder in the fields of railway and air carrier mail pay lend additional support to the conclusion
187 we have reached. None of these acts[15] has been held

[13] Federal Power Commission, et al. v. Natural Gas Pipeline Co., et al. 315 U. S. 575, 590 (1942).

[14] Conversely it is well established that a regulated utility cannot be required to give up excess earnings from past operations. Board of Utility Commissioners, et al. v. New York Telephone Company, 271 U. S. 23, 31, 32 (1926), Newton v. Consolidated Gas Company of New Jersey, 258 U. S. 165 (1922).

[15] July 28, 1916, c. 261, 39 Stat. 412 (Railway Mail Pay Act of 1916) which provides at page 429 (Sec. 5), that:

"The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so

to confer a retroactive mail rate-fixing authority.' In none of the 18 mail rate cases under the Railway Mail Pay Act or the 26 mail rate cases under the Air Mail Act of 1935, decided by the Interstate Commerce Commission prior to the passage of the Civil Aeronautics Act of 1938 did the Commission refix a rate for a period prior to the initiation of the proceeding.[16] The degree to which the Interstate Commerce Commission felt bound by this limitation is best illustrated in the *Railway Mail Pay case*, 144 I.C.C. 676 (1928).[17] In that case a group of carriers filed petitions for reexamination of mail rates. After preliminary investigation, the Commission broadened the proceeding to include the rates of a much larger group of railroads. After investigation and hear-

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made and published shall continue in force until changed by the commission after due notice and hearing.''

June 12, 1934, c. 466, 48 Stat. 933 (Air Mail Act of 1934) which provides at page 935 (Sec. 6a) that:

''The Interstate Commerce Commission is hereby empowered and directed, after due notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation for the transportation of air mail by airplane and the service connected therewith over each air mail route, but not in excess of the rates provided for in this Act, prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing.''

August 14, 1935, c. 530, 49 Stat. 614 (Air Mail Act of 1935) which provides at page 616 (Sec. 5):

''Subsection (a) of section 6 of such Act is amended to read as follows:

''(Sec. 6(a). The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation within the limitations of this Act for the transportation of air mail by airplane and the service connected therewith over each air-mail route, and over each section thereof covered by a separate contract, prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, and so much of subsection (g) of section 3 of this Act as is in conflict with this section is hereby repealed.''

[16] Under specific provisions of the 1935 Act which became law on August 14, 1935 (Sec. 8, 49 Stat. 614), the first rates fixed thereunder could be retroactively fixed as of March 1, 1935, but this type of retroactivity under specific statutory authority is not here involved.

[17] See also Railway Mail Pay, 165 I. C. C. 774 (1930).

ing, the Commission found the rates not fair and reasonable and ordered a review. But, although it found the rates to be inappropriate for all the carriers during the period under review, it made the higher rates effective from the date of the petition only for those carriers which had petitioned. For the other carriers, the adjustment was made only from the date the proceeding was broadened to include them. Such a holding is consistent only with the conclusion that the Railway Mail Pay Act of 1916 did not authorize a rate to be fixed prior to the date on which a rate proceeding was initiated for a carrier. The Act directed the Commission to fix fair and reasonable rates, and it found the rates for the non-petitioning carriers to be not fair and reasonable prior to the date on which they were included in the proceeding. Under these circumstances, it would have been highly arbitrary for the Commission, had it been empowered to fix rates for the period involved, to have refused to make such rates effective during this period for which it had found previously fixed rates to be not fair and reasonable.

189 In view of the similarity between the first provision of section 406 and the language of these earlier acts, the consistent constructions of those acts by the Interstate Commerce Commission is highly significant in interpreting section 406 and raises a strong presumption against the existence of any such retroactive power as is claimed by the respondents herein.[18] Supporting this interpretation is the fact that there is not one word in all

[18] *United States Steam Navigation Co.* v. *Cunard Steamship Co., Ltd., et al.*, 284 U. S. 474, 480, 481 (1932). A point has been made by the carriers in argument that the Railway Mail Pay Act of 1916 and the Air Mail Acts of 1934 and 1935 contain the following language not found in section 406: ". . . Orders so made and published shall continue in force until changed by the commission after due notice and hearing" and that, therefore, the construction of these earlier acts is not controlling in determining retroactive power under section 406. We note that a similar provision with respect to our orders is contained in section 1005(a) of the Civil Aeronautics Act of 1938. In our opinion such a provision does no more than state an obvious fact with regard to the orders of an administrative agency, namely, that except where otherwise limited they continue in effect until modified by further orders of the agency. That such a provision is not determinative with respect to the retroactive power of a rate making body was settled in the *New York Central case, infra.*

the legislative history of the Civil Aeronautics Act of 1938 to indicate an intention or understanding that the Civil Aeronautics Act contemplated a retroactive rate-making authority such as is contended for by respondents. There is no indication that the authority of the Board was to be greater, with respect to the periods for which mail rates might be fixed, than that which was exercised by the Interstate Commerce Commission under the Railway Mail Pay Act of 1916 and the prior Air Mail Acts.[19]

Furthermore, there is a clear and adequate explanation of the second provision of section 406 upon which respondents rely. It was added in order to effect a specific purpose, and that purpose was not to enable the Board to fix retroactive rates, or to exercise any authority with respect to the periods for which rates could be fixed which had not been theretofore exercised by the Interstate Commerce Commission under the Railway Mail Pay and Air Mail Acts already referred to.

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Prior to the decision of the Supreme Court in the *New York Central* case[20] there existed considerable doubt as to whether the Interstate Commerce Commission, under the Railway Mail Pay Act, could make its mail rate orders effective prior to the date of the final order and back to the date of the initiation of a mail rate proceeding. This doubt arose out of the fact that the provision conferring mail rate-making authority upon the Interstate Commerce Commission was in traditional public utility rate-making language which had theretofore been construed generally to authorize the fixing of rates prospectively from the date

[19] The report of the Aviation Commission, set up under Section 20 of the Air Mail Act of 1934, which was largely responsible for the consideration of the legislation which eventuated in the Civil Aeronautics Act of 1938, recommended that the mail rate should be adjusted by a proposed commission "exactly as the rates for carrying mail by rail are prescribed by the Interstate Commerce Commission." *Report of Federal Aviation Commission*, 74th Cong., 1st Sess., Senate Doc. No. 15, January 30, 1935, p. 64.

[20] United States v. New York Central Railroad Company, 279 U. S. 73, 75 (1929). The court here said: "We assume that while the railroads perform the service and accept pay without protest they get no ground for subsequent complaint. * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid from the moment the application is filed."

of a utility commission's final decision. In the *New York Central* case, the Supreme Court found that the Congress had intended that the Interstate Commerce Commission could fix mail rates effective prior to the date of final decision and back to the date of initiation of proceedings. In reaching this decision, the Supreme Court found that Congress had utilized the power of eminent domain in requiring all railroads to carry mail under the Railway Mail Pay Act of 1916. The Court found that the carriers were constitutionally entitled to fair and reasonable compensation from the date on which they had instituted a proceeding; that unless the Commission had authority to make its rate orders effective back to that date no provision would be made for certain constitutional rights of the carriers.

191 It will be noted that considerable similarity characterizes the language in Section 5 of the Railway Mail Pay Act of 1916 and Section 6a and 5 of the Airmail Act of 1934 and the Airmail Act of 1935, respectively. One might have assumed, therefore, that the principles applied in the *New York Central* case would be made applicable to the interpretation of the Airmail Acts of 1934 and 1935. Differences, however, exist to some degree as to the extent to which air carriers, as distinguished from the railroads, could be obliged under these Acts to carry the mail. These differences led to a divergence of views among the members of the Interstate Commerce Commission on the question as to whether the Airmail Act gave them authority similar to that contained in the Railway Mail Pay Acts to fix rates that could be made retroactive to the date of filing a petition.

In *Air Mail Compensation* decided June 6, 1936, by Division 3,[2] it was held, in substantial reliance upon the *New York Central* case, that the Commission had authority to make its mail rate orders effective prior to the decision date and back to the date of commencement of proceedings. Chairman Mahaffie dissented, in part on the ground that

[2] 216 I. C. C. 166 (1936).

the *New York Central* case was based on eminent domain and constitutional requirements and was no sound authority under the Air Mail Act of 1934. On appeal to the full Commission, the decision of Division 3 was sustained.[22] Commissioners Lee and Mahaffie dissented, and Commissioners Splawn and Caskie concurred in a separate opinion, but they pointed out in their opinion that the *New York Central* case was not necessarily a governing precedent for the Commission's action.

192 Commissioner Mahaffie continued to dissent on this point in six separate proceedings, the last of which was issued after enactment of the Civil Aeronautics Act of 1938. Thus, during the entire period during which the Civil Aeronautics Act of 1938 was under consideration by Congress, a difference in views over the meaning of certain language in the Air Mail Acts continued. Since substantially identical language was being considered for inclusion in what later became section 406 of the Civil Aeronautics Act, clarification of Congressional intent was advisable. To accomplish this purpose, the last clause of section 406(a)(1) was added.[23]

Colonel Gorrell[24] explained the *New York Central* case to House and Senate Committes[25] and concluded:

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[22] Air Mail Compensation, 222 I. C. C. 602 (1937).

[23] ". . . and to make such rates effective from such date as it shall determine to be proper."

[24] Colonel Gorrell, at that time President of the Air Transport Association, was one of the principal witnesses at the hearings in both Houses of Congress.

[25] The carriers have contended that we can give no consideration to the testimony of witnesses at the hearings before Congressional Committees considering the bills which ultimately resulted in the Civil Aeronautics Act of 1938. On this point we find that the use of committee hearings as aids in legislative construction has long been accepted as proper. In the last term of the Supreme Court such use was made of legislative hearings in at least seven cases: United States v. Ogilvie Hardware Company, Inc., 67 S. Ct. 997 (1947); Rice, et al. v. Santa Fe Elevator Corporation, et al., 67 S. Ct. 1146 (1947); United Brotherhood of Carpenters and Joiners of America v. United States, 67 S. Ct. 775 (1947); United States v. Hoy, 67 S. Ct. 1004 (1947); Levinson v. Spector Motor Service, 67 S. Ct. 931 (1947); United States, et al. v. Seatrain Lines, Inc., 67 S. Ct. 435 (1947); American Stevedores, Inc. v. Parello, et al., 67 S. Ct. 847 (1947).

Earlier acceptance of the same principle is found in: Church of the Holy Trinity v. United States, supra; United States v. McGowan, et al., 302 U. S. 535 (1938); Brooklyn Bank v. O'Neil, 324 U. S. 697, 709 (1945); Oregon-Washington Railroad & Navigation Company v. McGinn, 258 U. S. 409 (1922); United States v. Rehwald, et al., 44 F. (2d) 663 (S. D. Calif. 1930).

". . . . there is no substantial doubt but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed." [26]

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He later suggested the new language of section 406, i.e., ". . . . and to make such rates effective from such date as it shall determine to be proper," [27] and stated that by this change "the present authority of the [Interstate Commerce] Commission to fix appropriately the effective date of its rate decisions is likewise specifically preserved." [28]

There does not appear any other comment on or information concerning this language in the entire legislative history of the Act or its predecessor bills. It is clear that the "effective date" amendment was offered for purposes of clarification, not for the purpose of granting a power

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which did not already exist. Colonel Gorrell merely sought to preserve the existing authority of the Commission which, as founded on the *New York Central* case, and as later followed in the early air mail decisions, was limited to the fixing of mail rates that could be made effective as of the date proceedings were initiated.

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[26] Id. pp. 483-5. For similar testimony before the House, see *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., pp. 325-7.

[27] Hearings before subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess., p. 523.

[28] Id. p. 525. After discussing the retroactive rate decisions of the Interstate Commerce Commission before the House Committee, Colonel Gorrell proposed the same amendments and made exactly the same comment. *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., p. 408. When H. R. 9738 and S. 3659 were substituted for H. R. 5234 and S. 2 (see footnote 6) the rate-making provisions therein embodied Colonel Gorrell's amendment. In testifying upon these bills, Colonel Gorrell, at the suggestion of the Committee Chairman (at both the House and Senate hearings), did not testify as to those details which he had covered in his testimony on the original bills. He stated: "Last year in testifying, as your chairman has said, we discussed at length the need for legislation. With your permission, we will not cover any of the details which we covered last year." (Emphasis supplied.) *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3rd Sess., pp. 296-7. *Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3rd Sess., p. 21.

In spite of this clear indication that no retroactive rate-making authority was in fact intended by the statutory provision relied on by respondents, it is asserted that the Civil Aeronautics Act of 1938 contains subsidy and developmental provisions not contained in other acts, and it is urged that the proper administration of those aspects of the Act requires that the Board be empowered to make carriers whole for deficiencies in revenues incurred during periods prior to institution of any rate proceeding and while a rate previously fixed by the Board was in effect.

At the outset it may be pointed out that insofar as the Civil Aeronautics Act may be said to authorize "subsidy," the Air Mail Act of 1934, originally, and as amended by the Air Mail Act of 1935, would appear to have authorized it in much the same fashion.[29] Under these Acts, airplane

[29] Contract rates mentioned in those Acts were in terms of rates per airplane mile and the limitations on maximum payments that could be made were expressed in the same terms. The Interstate Commerce Commission in fixing rates used a base rate per airplane mile for a base poundage of 300 pounds. This base rate was payable on mail loads, no matter how small. Above that poundage additional amounts became payable. Since loads rarely attained the base poundage, the amount paid for the carriage of mail bore no direct relationship to the amount of mail carried.

The basic nature of the Acts is, however, most clearly apparent from the rate-making principles enunciated by the Interstate Commerce Commission in its first case (under the 1934 Act) Air Mail Compensation, 206 I. C. C. 675. At page 717 the Commission stated:

"Passenger service is required by the Government, and that requirement compels the acquisition and operation of equipment superior to that which would be required if the mail were flown without passengers. Such equipment is more expensive to own and operate than aircraft which could meet the speed and other requirements for mail service alone. Even where the passenger service is rendered on exclusive passenger schedules, it does not follow that such schedules must be entirely ignored in the fixation of rates for the transportation of air mail in view of the necessity for providing passenger traffic, and not the mail service, and the use made of exclusive passenger schedules in mail service."

And further stated at page 722:

"If rates were fixed by the use of cost allocations at this time, all incentive for the maintenance and future development of passenger traffic might be destroyed, and a tendency to revert to exclusive mail service might follow. The effect of efforts to reduce the cost of mail service by increasing the returns from passenger business would be lost. It is obvious that the time has not yet arrived when the passenger business of the contractors can stand alone."

Applying the principles so expressed, the Interstate Commerce Commission, instead of fixing mail rates on the basis of the cost of the mail service arrived

mileage rates were specifically provided for, non-
195 mail schedules were to be considered in fixing rates
and the amount paid did not have to bear a relation-
196 ship to the amount of mail carried. Yet, despite
these "subsidy" features, these Acts were never considered to grant the retroactive power here claimed.

There is no reference in the Civil Aeronautics Act to subsidy as such. To whatever extent subsidy may be contemplated by the Act, it is provided through a mail rate as "a fair and reasonable rate of compensation for transportation of the mail," et cetera. Such a rate, under the Act, may provide greater revenue to the carriers than would be required to compensate solely for transporting

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at by a distribution of expenses between the various services, fixed rates so as to make up the difference between total cost (including a fair return) and total revenue on designated mail routes. This is very much the same type of subsidy that is used in the Civil Aeronautics Act of 1938.

Under those Acts, the Postmaster General designated certain schedules for the carriage of mail and it was to the mileage of these designated schedules that the mail rates applied. Because it was often convenient to carry mail on exclusive passenger schedules, the 1935 Act specifically provided that the Postmaster General might, at a carrier's request and for his convenience, authorize the carriage of mail on a non-mail schedule with the understanding that the weight of mail so transported would be credited to a regular mail schedule and no mileage compensation would be paid therefor. Such authorized but not designated trips were known as weight-credit schedules. Though section 6(c) of the 1935 Act contained a direction to the Commission to disregard losses resulting in the opinion of the Commission from the unprofitable maintenance of non-mail schedules in cases where the Commission found that the gross receipts from such schedules failed to meet the additional operating expenses occasioned thereby, the Commission in Air Mail Rates for Route No. 24, 222 I. C. C. 749, ruled that the limitation was not applicable to weight-credit schedules. This holding wiped out the limitation of section 6(c) as to the losses which the Commission might consider so far as it concerned any exclusive passenger schedule which for the convenience of the carrier had been authorized for the carriage of mail on a weight-credit basis. This meant that for all weight credit as well as designated mail schedules the total costs of the schedule might be considered in fixing the rate. Moreover, although the Commission had in its first case adopted a general rule of disregarding costs and revenues from "off line" schedules, it dropped any such distinction insofar as such off line schedules were designated for the carriage of mail or were authorized on a weight credit basis. Air Mail Rates for Route No. 2, 231 I. C. C. 229. The net result of all of these rulings was that so long as a schedule was designated or authorized to be used for mail, air mail pay was used to make up the difference between total cost and total revenue and provide a return to the operator, precisely the same type of subsidy as is found in the Civil Aeronautics Act of 1938.

Even an "on line" exclusive passenger schedule neither authorized nor designated for the carriage of mail received a degree of subsidy, since only the additional out-of-pocket costs incurred in its operation were charged against it. Air Mail Compensation for Route No. 2, supra, the general overhead being entirely carried by mail pay. See also note 42, infra.

the mail only by virtue of the fact that the Board, in determining such rate, is directed to consider the need of the carrier for revenues sufficient not only to perform the mail service but sufficient, together with all other revenues, to enable it to achieve objectives of the Act with respect to air transportation generally. To whatever extent
197 "subsidy" may be authorized by the Act, therefore, it must be included in a mail rate fixed and determined in accordance with the provisions of the Act. It is difficult to understand by what logic it can be argued that the Board can fix a retroactive rate for a past period for which it could not otherwise do so, simply because, in arriving at the amount of the rate, it is directed to consider factors not ordinarily considered by other rate-making agencies.

It is urged, however, that such retroactive authority is *essential* to carry out the purposes of the Act. With this contention we cannot agree. Far from being essential, we believe that such retroactive authority would be definitely harmful in the administration of this Act. The effect of such retroactive rate-making would be to change radically the fundamental principles upon which we believe the Act is based.

The respondents in effect urge a cost-plus subsidy plan, in place of a traditional prospective rate-making technique. Under the latter plan there is a twofold pressure to economy and efficiency caused by the necessity of living within a known rate and by the prospect of being able to retain earnings which may be effected under the rate. Administration of the mail pay provisions of the Act through the instrumentality of a prospective rate is designed to foster a sound air transport system in the interests of the traveling public, the post office, and the national defense while retaining in this industry competitive characteristics which, under our economy, are deemed desirable and productive of public benefit.

Consistent with the principles of the Act, in fixing a rate for the future we allow a rate designed to pay the carrier

a reasonable return upon its investment for assuming the risks incidental to operation. Initially, if the carrier believes the rate fixed by us to be unreasonable, it has the opportunity to seek review of our action. Even though the rate be deemed initially reasonable, events may, of course, take an unhappy turn and this may result in low earnings or even in losses despite the efficiency of the carrier's management. But in that event, the carrier has the opportunity to petition us for a new rate based upon new circumstances and new facts. This theory of rate administration is designed to promote competency in management through the incentive of profit. At the same time, as a counter-balance, losses incurred under a reasonable rate acceptable to the carrier must be absorbed.

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Contrariwise the suggestion of the parties to this case is that we assume the responsibility of making up losses incurred over a period of time during which management either did not believe the rate to be an unreasonable one or, if it held such a position, did not see fit to inform us of that fact. On its face the suggestion asks us substantially to put all so-called efficient managements on a cost-plus basis. This would obviously be a reversal of past policies of rate fixing for it would have a natural corollary—the corollary that was freely admitted in this case—that earnings of air carriers in excess of a fair and reasonable rate would be subject to recapture. Such a policy would tend to sap management of those very incentives that in a private economy are essential if we would strive for efficiency.

To avoid the cost-plus operation of the doctrine now advanced, TWA suggests that our power to fix retroactive rates is a discretionary one and should only be exercised under "unusual circumstances," but such a limitation when examined is either illusory or impossible of application. Any circumstances that had a depressive effect on earnings and that were beyond the control of management would seem to come within the classification of "unusual." The result would thus be that the standard

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in fact would become one of placing efficient management on a cost-plus basis. The other alternative would give us a discretion both to give and take that would be arbitrary and provocative of endless litigation, both before us and the courts.[30]

There are further difficulties with the suggested construction of the statute. The discretion of the Board could be appealed to at any time, possibly limited by the doctrine of laches, to make up for past losses. Similarly, the Board could at any time exercise its discretion to recoup past gains. Financial statements of air carriers would thus never become firm. Similarly, the Post Office's accounts would be subjected to the same uncertainties, and similar infirmities would surround the preparation of budgets for the airmail postal service. Chaos and confusion stretching back to 1938 would be the result.

In support of their contention as to unusual circumstances, respondents rely chiefly on the Western case,[31] but on careful analysis of the facts in that case we can find no support therein for respondents' position. In that case the carrier had a mail rate applicable to two old routes. It started service on a new route and six months later petitioned for a system rate. In determining what additional compensation was required because of the operations on the new route, we reviewed the operations of the entire system from the date of inauguration of the new route and found that no increase in the mail compensation already payable was required because of the new route. Obviously when a new operation is commenced the question of mail compensation for that operation from

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[30] To interpret the statutory language "make such rates effective from such date as it shall determine to be proper" as granting the broad discretion here urged raised formidable administrative and constitutional difficulties. There is another construction which avoids these difficulties and yet gives meaning to the language, that is, that it empowers and directs us to make an order effective from the date we determine to be *legally* proper. So in the case of a new route for which no mail rate was previously in effect, we are given authority to make the rate effective from the date operations commenced thereon, as is constitutionally necessary, even though mail rate proceedings are not initiated until later. See note 32, infra.

[31] Western Air Lines, Mail Rates, 4 C. A. B. 441 (1943).

its commencement must be decided.[32] In determining the compensation to which Western might be entitled for the new route for this retroactive period, we said:

". . . . that in considering and determining the rate of mail compensation to respondent for mail services heretofore performed on Route No. 52, the need of the carrier should be considered and determined upon a system basis. . . . ."

Proceeding on that basis we found that Western was entitled to no additional compensation for having operated Route 52 from the date of the inauguration of service in June 1941 to December 31, 1941. In the opinion we said in part:

"In the absence of *like unusual circumstances* the Board will adhere to its policy not to review rates prior to the institution of a proceeding . . . ." (Emphasis supplied.)

It is in reliance on the language last quoted that the contention is made that the case establishes the principle that we can ignore the date of institution of a proceeding where there are unusual circumstances. TWA then argues that the grounding of the Constellations and the pilots' strike constitute such unusual circumstances as would bring it

[32] In recognition of that principle we have in a number of cases determined rates for certain routes from the date operations commenced thereon, even though this antedated the initiation of proceedings, but these cases do not recognize any general power to determine rates for periods prior to the initiation of proceedings. These cases involved no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes. All American Aviation, Mail Rate for Route No. 49, 3 C. A. B. 79 (1941); United A. L., Mail Rate for Route No. 57, 3 C. A. B. 381 (1942); Pan American Airways, Inc., Alaska Mail Rates, 6 C. A. B. 61 (1944); Caribbean-Atlantic Air, Mail Rates, 6 C. A. B. 407 (1945). There is language in the opinion in American A. L., Mail Rates, 3 C. A. B. 323, 331 (1942), which might support the argument that we have full discretion in determining the extent to which our rate orders may be made retroactive, but any inference which may be drawn therefrom must be limited by the fact that the case involved only the power to reduce rates for the retroactive period prior to the date of the rate order but *after* the date of initiation of the proceeding.

within the exception.[33] But such construction obliterates the word "like" in the quotation and disregards the facts in the *Western* case. These facts make it clear that
204 the *Western* case is no more than another application of the requirement that where there is no rate in effect for a route we must consider mail pay requirements arising as a result of the new operation from the date mail service begins thereon, irrespective of the date on which mail rate proceedings are initiated.[33]

As we have indicated above, the fact that subsidy may be included in a rate which we may fix, as is urged by petitioners, has no proper place in an argument concerning the periods for which we are empowered to fix such a rate. We are convinced, moreover, that sound administration of the Act in its developmental aspects not only requires no retroactive authority but can best be achieved without it. This conclusion is consistent with our administration of the Act since 1938.

Although this Board has consistently recognized the developmental responsibilities placed upon it by the Civil Aeronautics Act of 1938, its administration of the mail pay provisions of the Act has uniformly recognized that the basic principles of public utility rate-making apply
202 to the fixing of mail rates. In the *Chicago and Southern* case[34] we denied the carrier's request that a reduction in rates be deferred until it had an opportunity to accumulate net earnings sufficient to yield a fair return on its investment from the beginning of operations. We there stated:

"The mail rate provisions of the Civil Aeronautics Act do not call for what would be in effect a revision of his-

[33] The obvious impracticability of the suggestion that we might exercise a retroactive rate-making discretion on the basis of "unusual circumstances" is clearly shown in the TWA case. Neither the grounding of planes, especially when new equipment is being used, nor labor difficulties are particularly unusual, and both are to be expected from time to time. The "unusual" characteristic of the grounding of the Constellations and of the TWA strike is the amount of the losses resulting therefrom. We could certainly not turn the exercise of a discretionary authority to make a carrier whole for past losses on the amount of such losses.

[34] Chicago and Southern Air Lines, Mail Rates, 1 C. A. B. 419 (1943).

torical earnings so as to reimburse the carrier for inadequate profits received in the past; these provisions require the establishment of present and future rates which will enable the carrier under honest, economical, and efficient management to discharge its public service obligations as specified by the Act. The statutory policy is not remedial of past inadequacies; it is instrumental of present and future accomplishment."[35]

In all our rate decisions we have assumed that risk of loss, should rates prove inadequate, would fall upon the carrier, and we have allowed a rate of return commensurate with the risks that appeared to be involved. The most striking illustration of this is to be found in the *Big Four* cases wherein TWA's present 45-cent rate was fixed. Although the rate proposed in the show cause order was 32 cents, we increased it to 45 cents to compensate for the higher risks we foresaw in the transitional post-war period.

The concept of providing payment for risk in the rate of return to which we have consistently adhered is diametrically opposed to the principle of reimbursement for past losses. In urging such reimbursement, the respondents completely misconceive the function of a rate. A rate represents full compensation for the services rendered or to be rendered during the period for which the rate is effective. This includes full compensation for riskbearing. This payment for riskbearing is high when the risks appear to be great and low when the risks appear to be small, but it is a payment for the function of bearing the risk and is not intended as a reimbursement for every loss which may in fact occur.[36]

203 That the mail rate provisions of the Act were intended to be administered in accordance with the principles just discussed is indicated by the legislative his-

[35] Ibid. p. 420.

[36] The different rates of return in Pan American Grace Airways, Inc., Mail Rates, 3 C. A. B. 550 (1942) and in Pan American Airways, Inc., Transatlantic Mail Rates, Order Serial No. E-612, decided June 9, 1947, exemplify the manner in which the rate of return reflects the risks involved.

tory of the Act. Prior acts had been relatively temporary measures.[37] The Civil Aeronautics Act was intended as permanent long-range legislation. Its all-important objective was to afford the air transport industry relief and protection in the nature of that afforded public utilities.[38] What was desired was protection against uncontrolled competition by non-mail operators, and against cut-throat competition in freight and passenger fares by other mail operators.[39] What was sought was sufficient stability under public utility type regulation to make it possible for the industry to attract the private capital necessary for its development.[40] It was clearly recognized that a "rate structure" founded on traditional rate-making principles was necessary as one adjunct of the protection inherent in common carrier and utility regulation.[41]

204 Although there was some discussion of direct subsidy, the proposal was clearly rejected in favor of the plan whereby the needs of commerce and the national defense were merely additional elements to be considered

[37] "*The Air Mail Act of 1934 was designed as a temporary measure.* Many of its provisions are ambiguous; others definitely contradictory; and still others are not susceptible of rational understanding." Senator McCarran, 83 Cong. Rec. 6634 (May 11, 1938). (Emphasis supplied.) "Indeed, *the 1934 Act itself recognized its temporary nature* by providing for the appointment of a Federal Aviation Commission to recommend 'a broad policy covering all phases of aviation and the relation of the United States thereto.'" (Emphasis supplied.) Gorrell, *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st sess., p. 64.

[38] The extended discussion of certificates of public convenience and necessity, regulation of passenger fares to prevent cut-throat competition protection of routes, safety and labor regulations, control of accounts, mergers, interlocking relationships, etc., clearly indicate that it was desired to replace the emergency measures of the Air Mail Act of 1934 and the 1935 amendment with legislation involving permanent public utility regulation of airlines. Note 27, supra, pp. 51-64, 70, 310, 377, 467. Note 28, supra, pp. 27, 30, 39, 40, 46-8, 66, 68-9, 74, 76, 163, 164, 167-264, and 280.

[39] Note 28, supra, pp. 69, 74, 81-2, 164.

[40] *Hearings before subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d sess., pp. 21, 30.

[41] Note 27, supra, pp. 438, 496-7.

in fixing a "fair and reasonable rate." [42] There is no indication whatever of any intention to change the traditional rate-making procedure of the 1935 Act.[43] The principal substantive changes apparently sought in the mail rate provisions of the Act were a removal of the provisions for disregard of non-mail losses and those provisions fixing maximum limits to mail rates and relating total mail pay to total postal revenues from air mail.[44]

There is not one indication in all the legislative history or in the Act itself that a guarantee of carriers against losses under rates found fair and reasonable by tra-
205 ditional public utility rate-making procedures were intended or thought necessary to accomplish the developmental purposes of the Act. There is no doubt that the Congress could have provided a statute which embodied such a guarantee, but it is clear that it did not, and did not intend to do so.

Our conclusion makes the date of filing of a rate petition in many cases of great importance. But this is not a mere

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[42] "Moreover, the bill does not provide a subsidy in the sense mail subsidies were provided under the old system of ocean mail contracts. Those contracts set up an arbitrary dole to be paid to the shipping companies solely on the basis of mileage sailed, even though virtually no mail was carried. . . . This dole increased year by year and bore no necessary relation to the mail service. The present bill makes no such provision . . . Instead, it leaves the way open so that the Commission can apply the most suitable method as the facts warrant, with an effort to adjust the amount of pay to the service rendered from time to time as the public interest may dictate." Gorrell, note 28, supra, at p. 316, and note 27, supra, at p. 468.

Mr. Haley, Director of the Bureau of Air Mail, Interstate Commerce Commission, distinguished the "direct subsidy" doctrine as follows: "But the commission does not do that [add to an existing mail rate operating losses]. *If that were the legislative policy of the Congress perhaps it should be expressed in an act similar to the Maritime Act, where the subsidies are specifically provided. It is not in this act.* [Emphasis supplied.] There is no reference to subsidy in this Air Mail Act." Note 27, supra, at p. 251. See also Note 28, supra, pp. 36, 79, 151, 243, 244, 308, and Note 27, supra, pp. 75, 76, 121, 169, 337-8, 339, 465.

[43] "The bill now before you provides what seems to us the appropriate method of determining compensation. It is a method quite similar to that adopted in the case of transportation of mail by the railroads, and since the Commission is to fix other rates, which themselves will have some effect upon the cost of transportation of mail, it would seem that the same commission should determine reasonable pay for mail carriage." Gorrell, Note 28, supra, p. 307. "The provision is very largely copied from the Railway Mail Pay Act. I refer you to 39 U. S. C. A. section 542." Gorrell, Note 27, supra, p. 446.

[44] Note 28, supra, pp. 233, 308, 309.

insistence on certain procedural requirements for their own sake. Instead, the filing of a petition when rates have already been fixed is a matter of substance, for until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take whatever action we might feel it incumbent in that event for us to take. Until a petition is filed presumably the rate is regarded as reasonably remunerative by the carrier. We should be allowed as a matter of effective administration to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief whether in the form of revision of rates or otherwise. The carrier should be enabled to rest upon a similar assumption until some action by us is initiated. Any other approach would mean that those important relationships between the carrier and the government which center about rates and which at the time are deemed satisfactory by both parties and upon which both parties have acted and planned could later be re-examined and reshaped. This would im-
206 peril stability both from the standpoint of the government and of the carrier, for it is idle to talk of rates being fixed if, at any time thereafter they could be retroactively revised.

It has been suggested that it will be the effect of this decision to cause all carriers to keep a "protective" petition on file with the Board at all times in order to prevent unpredictable losses. We do not anticipate this development. From management's viewpoint the situation will not be materially different from that which has existed heretofore. The carriers have long been aware of our unbroken policy not to fix retroactive rates. Furthermore, the Board has exactly the same authority with respect to the date from which it can make its mail rate orders effective, whether a new rate be higher or lower than one previously in effect. Unless a carrier believes that it will realize less than a fair and reasonable return from the date on which it files,

there would be little point in filing. Should it file and thereafter earn more than a fair and reasonable return, our rate order, effective from date of filing, would effect a reduction in mail pay from that date forward.[45]

207 In addition to the points already discussed, several other contentions made by respondents require some comment. PCA contends that it has a constitutional right to be made whole for past losses and that the statute must be construed to permit this in order to sustain its constitutionality. We can find no merit in this contention. In applying for a certificate to carry mail, a carrier must be presumed to have relied on the provisions of the statute which define the compensation to be paid for that service. Under the statutory provisions, such compensation is to be a "fair and reasonable rate" and the carrier is entitled to no more than is comprised within that term. But a rate is constitutionally adequate if it affords a carrier an opportunity to earn a fair return. There is no constitutional requirement that the carrier in fact earn such a return or that it be given an opportunity to recoup past losses incurred under rates which experience has proved inadequate.

Finally, both respondents make the contention that irrespective of our general policy to fix retroactive rates prior to the date of initiation of a rate proceeding, we are required to do so where a new route is established for which there was no mail rate in effect. In those cases, it is contended, we are required to review the rates of the entire system from the time service was inaugurated on the new route, irrespective of whether a proceeding has been initiated either for the new route or for the system. PCA asserts that service on its Routes 34, 41, and 51 was suspended at the time the 60 cents per ton-mile rate was fixed, and that

[45] It should be noted that the decision in the *Panagra* case (Pan American Grace Airways, Mail Rates, 3 C. A. B. 550 (1942)) where we refused to recapture excess earnings for the period between initiation of proceedings and issuance of the rate order, does not constitute an immutable holding that we will in no case make a downward readjustment retroactive for such a period. The holding in that case was made in the light of the conditions then existing and may, of course, be reconsidered as conditions dictate.

it is entitled to a review of its system rates at least from the date it resumed service on these routes. TWA points out that it commenced operations on its international routes on February 1, 1946, and asks for a review of its system rates at least back to that date.

208 The contentions of respondents appear to rest on a misconception of the *Western* case. As we have mentioned previously, that case was no more than an application of the principle that where there is no rate in effect for a new route we must consider mail pay requirements arising as a result of the new operation from the date mail service begins thereon, irrespective of the date mail rate proceedings are initiated. The decision does not require us to make a carrier whole for past losses on its system simply because a new route was placed in operation prior to petition date.[46]

In fixing mail rates it is our general policy to do so on a system basis. Consistently therewith, in determining the mail pay requirements for a new operation, we review overall operating results and determine total mail pay requirements. If the total mail compensation is adequate, we need not allow any additional compensation for the new service whether or not the operation of such service may antedate the commencement of proceedings. If total mail compensation was inadequate for the entire past operation,

209 including the new operation, we would determine the extent to which such inadequacy was attributable to the new operation, and we would provide the additional

[46] In the pending *Northeast* case, Dockets Nos. 1932 and 1890, some four weeks after the filing of the carrier's petition for a rate on a new route, a Board order was issued proposing a system rate effective back to the date of inauguration of service on the new route. During the 7-week period a previously fixed rate was in effect for the balance of the system. A show cause order later was issued proposing a system rate effective from commencement of new route operations, and this rate was later put into effect as a temporary rate. In the pending *Colonial* rate case, Docket No. 2724, the carrier filed a petition for a system rate some eight months after commencing operations on a new route. During the 8 month period a previously fixed rate was in effect for the balance of the system. A temporary system rate was set by the Board effective from commencement of operations on the carrier's new route. The proper treatment of the questions raised in these cases will be decided when final rates are fixed therein.

mail pay needed to compensate for the new service. In the absence of a proceeding putting in issue the rates on the balance of the system, we do not believe that we should readjust rates to make up for mail pay inadequacies incident to operations other than the new service.

The principle of the *Western* case could in no event apply to PCA's situation. The *Western* case applied to a situation where operation was begun on a new route for which a rate had never been previously fixed. In the case of PCA, the December 16, 1942 order specifically fixed rates for the suspended routes. TWA is likewise excluded from any possible application of the *Western* case by the express terms of the order which fixed the 45-cent rate for its domestic system. In that order we specifically provided that the rate was not to apply to the international operation, for which we subsequently, in a separate proceeding, fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are separate units for rate-making purposes. Under these circumstances there is no basis for the application of the *Western* case.

In view of the foregoing, we hold that we have no power to fix a new rate for an operation to apply to a period during which a final rate for that operation was in effect and not challenged by the initiation of a proceeding looking towards its revision. We, therefore, are of the opinion, that Public Counsel's motions in these proceedings must be granted and that respondents' petitions insofar as they request the fixing of mail rates effective prior to the date upon which respondents filed their mail rate petitions must be dismissed.

Accordingly, Public Counsel's motions to dismiss respondents' mail rate petitions in so far as they request the fixing of mail rates to be effective prior to the filing dates of those petitions are granted and said petitions are to that extent dismissed.

Appropriate orders will be entered.

Landis, Chairman, Ryan and Branch, Members of the Board, concurred in the above opinion. Lee, Member, filed the attached dissenting opinion.

211. Orders
Serial Number E-1033

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 2nd day of December, 1947.

Docket No. 2849

In the matter of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith of.

TRANSCONTINENTAL & WESTERN AIR, INC.,

over Routes Nos. 2, 38, 44 and 58.

Order Dismissing Petition in Part

Public Counsel having moved to dismiss the carrier's petition in the above entitled proceeding insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947, the filing date of the petition; oral argument having been held thereon; and the Board upon consideration thereof having issued its opinion containing its conclusions and decision, which is attached hereto and made a part hereof;

IT IS ORDERED, That the petition of Transcontinental & Western Air, Inc. filed March 14, 1947, insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947, be and it hereby is dismissed.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN,
Secretary.

(Seal)

212 **Lee, Member, Dissenting:**

I disagree with the majority's finding that the Board has no power to set a retroactive rate. Such a finding is contrary to the long-established policy of the Board, and is inconsistent with the express provisions of the Civil Aeronautics Act. The Act contains plain and unambiguous language as to the Board's power to establish rates retroactively, and the majority has gone to considerable length to read into the Act language which is not there and to place upon the Act a strained interpretation which is contrary to previous Board decisions and which Congress never intended.

Section 406(a) of the Act provides that the Board "is empowered and directed . . . to fix and determine . . . the fair and reasonable rates of compensation for the transportation of mail . . . *and to make such rates effective from such date as it shall determine to be proper.*" There is nothing ambiguous about this language. It states simply that the Board in its discretion may determine the date upon which its rate orders shall become effective. The interpretation of this plain language is not dependent upon legal theories; it requires nothing more than a working knowledge of the English language. The Board itself recognized and adopted a clear rule of statutory construction in the *United-Western Interchange* case[1] when it said:

"It is an established principle of statutory construction that it is not permissible to interpret the clear and unambiguous language of a statute. [citing cases] Although the title of Section 408 does not refer specifically to leases, that fact cannot be relied upon to create an otherwise absent ambiguity or to modify the meaning of the unambiguous language of subparagraph (a) (2) thereof."

213 This rule of statutory construction is equally applicable to the instant proceeding in which the majority seeks to "interpret" Section 406(a).

[1] 1 C. A. A. 723.

It is of interest to note that Section 1002(d) of the Act directs the Board in certain cases to prescribe the lawful rate for the transportation of persons and property "thereafter" to be charged. Here Congress intended to limit the Board's retroactive power, and it has done so by express and unmistakable language wherein rate orders should be prospective only. Again in Section 1002(h) the Board is given the power, upon complaint or upon its own initiative, to prescribe divisions of rates "from the date of filing the complaint or entry of order of investigation, or such other date *subsequent* thereto as the Board finds to be just, reasonable and equitable." How different are Sections 1002 (d) and (h) from Section 406. Section 406 specifically gives the Board the power to make a rate for the transportation of mail effective from such date as the Board shall determine to be proper. Sections 1002(d) and (h) expressly limit the Board's power to act retroactively. If Congress did intend to limit the Board's rate-making power for the transportation of mail surely the restrictive language contained in Sections 1002(d) and (h) would have been inserted in Section 406. In my opinion Section 406(a) contains clear and unmistakable language in authorizing the Board to make rates of mail compensation effective from whatever date the Board determines to be proper.

The Board has consistently recognized that the Act provides it with legal power to make rates effective prior to the date of the institution of the proceeding, and the Board has frequently exercised this power. In the *Western Airlines Rate* case, 4 CAB 441 (1943); the carrier filed its petition on December 3, 1941. The Board, however, reviewed Western's need for mail compensation for the period beginning June 12, 1941. In the *All American Rate* case, 3 CAB 79 (1941) the carrier filed its petition on December 9, 1940. The Board set the rate not from the date of the filing of the petition, but from August 12, 1940, the date of inauguration of service. The Board treated United Airlines in a similar manner when it fixed

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a rate for Route 57, 3 CAB 381 (1942). United's petition was filed on May 21, 1941, and the rate set was from May 12, 1941. The same was true in the *Pacific-Alaska Rate* case, 6 CAB 61 (1945), where Pan American was compensated for carrying the mail for a period prior to the date of the filing of the petition.

In the recent *Northeast Rate* case,[2] Dockets Nos. 1932 and 1890, the Board issued a show cause order accompanied by a Statement of Tentative Findings and Conclusions which fixed a system rate of 18.65 cents per airplane mile for the period May 1 to October 31, 1945, in spite of the fact that the proceeding was not instituted until May 14, 1945, when Northeast filed a petition for the determination of a fair and reasonable rate for only one of its routes.

The majority now takes the position that the rate cases referred to above cannot be used as a precedent for the Board's authority to establish a retroactive rate because these cases involve the fixing of a rate for new routes for which rates had never been set. This is not true, however, because as recent as April 1, 1946, the Board issued a show cause order to Northeast, as pointed out above, which fixed a retroactive rate for that carriers' system. This
215 rate applied retroactively to one of Northeast's routes over which the Board had already fixed a rate on July 1, 1942. While it may be argued that the Northeast show cause order was not a final opinion and only a tentative action of the Board, it is significant that in the absence of any objections by the carrier, a show cause order becomes final. Rule 13(d) of the Board's Rules of Practice provides that if no answer is filed to the Board's show cause order, a statutory public hearing will be held and "will be expected to require nothing more than the introduction in evidence of the exhibits . . ." The Board then adopts the tentative decision and such decision becomes the final decision of the Board. In the absence of specific objections by Northeast the show cause order could have be-

[2] Order Serial No. 4623, Dated April 1, 1946.

come a final Board decision. While Northeast did file objections to the Board's Statement of Tentative Findings and Conclusions, no objection was raised with respect to this particular issue wherein the Board reviewed Northeast's rates for its entire system. Since Rule 13(e) of the Rules of Practice limits the issues in a rate case, it may be presumed that this phase of the Northeast show cause order will become final.

In attempting to distinguish the Board's action in the *Western* case, wherein Western's route No. 52 was under review from June 1941 despite the fact that the rate proceeding was not instituted until December 1941, the majority refers to the following language from the Western opinion:

> "In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding."

216 The majority now interprets this to mean that the Board has *no power* to review rates prior to the institution of a proceeding. But there is a vast difference between *power* and *policy*. The Board did not say that it had no power, but merely stated that it would *adhere to its policy* not to review rates prior to the institution of a proceeding, indicating that this is solely a matter of discretion. If the Board had meant to conclude that it had no power to fix a rate prior to the institution of a proceeding, it would have been a simple matter to write such a conclusion into the opinion.

No opinion has ever been issued by the Board which stated that the Board's power to issue a retroactive rate is in any way limited. As pointed out above, however, there are numerous decisions in which the Board actually exercised its power to set a retroactive rate. As recent as August 27, 1947, the Board exercised this power when its rate order became effective in the *Pan American rate* case, Docket No. 1706. Under Section 405(i) of the Act, the Post Office Department fixes the rates at which foreign countries

are to pay for the carriage of such mails and has the responsibility for effecting collection of amounts due, but such amounts are the property of the carrier. At the end of the year 1941, Pan American had various uncollected foreign mail accounts from Axis or Axis dominated countries and set up reserves of approximately $432,000 to cover these amounts. In the *Trans-Atlantic Rate* case, Docket No. 370, decided July 17, 1944, the Board included as an allowable cost the amount of $432,000 as a provision for a reserve for uncollectible foreign mail accounts receivable.

In its opinion which became effective August 27, 1947,
217 Docket No. 1706, the Board stated that "any amounts which have been or in the future shall be collected on account of the $432,224 foreign mail pay receivables here in issue shall be offset by the Postmaster General against mail payments otherwise due the respondent, without regard to whether such payments originate from services performed by the respondent's Atlantic Division or from services performed by any of its other operating divisions."

Pan American has now appealed the Board's decision in Docket No. 1706 with the Court of Appeals of the District of Columbia, contending, among other things, that the treatment of the 1940-1941 foreign mail receivables prescribed by the Board amounts to a recapture of Pan American's earnings beyond the power of the Board. In its petition to the court, Pan American argues that whatever power the Board may have had with respect to these 1940-1941 foreign mail receivables, such power was exhausted when the Board made its final determination in the previous rate case, Docket No. 370. Pan American takes the position that the proviso in the Board's order, Docket No. 1706, relating to these receivables is an attempt to deal in a case relating to 1945 with issues which were completely disposed of in the previous case, Docket No. 370. Pan American thus argues that once the Board has made a rate order final, such as that in Docket No. 370, the Board is without power to make new determinations on matters which should properly have been dealt with by such order.

It should be noted that a final order of the Board in Docket No. 370 was issued on July 17, 1944, and the proceeding in Docket 1706 was not instituted until December 30, 1944. Nevertheless, the Board exercised its retroactive power in connection with a matter which occurred four years prior to the institution of the proceeding and which was disposed of by final order of the Board six months prior to the institution of the proceeding. In this connection it is interesting to note the language of the majority in the instant proceeding which states as follows:

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> "We should be allowed as a matter of effective administration to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief whether in the form of revision of rates or otherwise. The carrier should be enabled to rest upon a similar assumption until some action by us is initiated. Any other approach would mean that those important relationships between the carrier and the government which center about rates and which at the time are deemed satisfactory by both parties and upon which both parties have acted and planned could later be re-examined and reshaped. This would imperil stability both from the standpoint of the government and of the carrier, for it is idle to talk of rates being fixed if at any time thereafter they could be retroactively revised."

While it is not my purpose to pass upon the merits of Pan American's contentions in this dissent, yet it is impossible to reconcile the majority's position in the instant proceeding with the action taken by the Board in the *Pan American* case, Docket No. 1706. In my opinion these two decisions are inconsistent, and it must be concluded that the majority has now reversed itself on the position taken in the *Pan American* case in August of this year.

The majority opinion confuses the terms "power" and "discretion." Section 406 gives the Board the power to fix a rate retroactively. How the Board will exercise that power is a question of discretion to be determined after

notice and hearing upon the facts of each case, and the date of filing of the petition has nothing to do with the Board's power. Consideration may, of course, be given to the
219 date of filing the petition, but that is a matter of Board discretion. In the *Pan American Rate* case the Board stated:

> "The relative weight to be given to each of the four standards which the statute has thus set forth and to the three national purposes enumerated under the fourth standard are matters which *lie solely within the discretion of the Board.* * * * Section 406(b) of the Act lays upon the Board the exercise of a *discretionary judgment in the determination of rates* which will, among other things, enable the air carrier under honest, economical and efficient management 'to maintain and continue the development of air transportation to the extent and of the character and quality required' for the triple national purposes to be served." [Italics supplied]

In the *Mid-Continent Rate* case,[4] the Board stated:

> "The fixing of 'fair and reasonable rates of compensation for the transportation of mail by aircraft' under Section 406(a) and (b) of the Act involves the delegation of a broad *discretionary* power which must be exercised in the light of certain considerations which Congress has specifically prescribed." [Italics supplied]

In these decisions the Board recognized that the fixing of a rate involves the Board's discretionary power. Under the majority's interpretation of Section 406 in the instant proceeding, however, it is difficult, if not impossible, to reconcile such an interpretation with the broad statutory objectives of Section 2 and Section 406 of the Act. The power to set a retroactive rate is there whether or not a rate petition is filed, and the exercise of this power is purely discretionary with the Board. To hold otherwise would invite carriers to continuously have rate petitions on file

[3] 1 C. A. A. 220, 253, 254.
[4] 1 C. A. A. 45, 55.

with the Board to protect themselves against losses which might occur before such petitions could be filed. In
220 such a situation there would still be left to the Board's discretion the relief to be accorded and the majority's objective to secure finality of judgment would still be missing because there would always be a new rate case pending as soon as the old one is disposed of.

For legal support of its position, the majority leans heavily upon its assumption that the Civil Aeronautics Act is sufficiently similar to other utility statutes as to allow the same construction. While there are similarities of language and objectives, yet the differences both of *language* and *objectives* are such as to render the utility cases relied upon by the majority of little value in construing the Civil Aeronautics Act. I shall take up first the differences in language. Reference is made by the majority to the Railway Mail Pay Act of 1916 and the Air Mail Act of 1934. Examination of these statutes reveals that the language with respect to rate-making is entirely different from the provisions of Section 406 of the Civil Aeronautics Act. Under the Railway Mail Pay Act, rates fixed by the Commission "shall continue in force until changed by the Commission after due notice and hearing." Even under that language the Supreme Court held in the *New York Central* case[1] that a new rate could be effective as of the date of commencement of the proceeding. The Air Mail Act of 1934 also provided that rates fixed by the Commission
"shall continue in force until changed by the said
221 Commission after due notice and hearing." In 1938, Congress passed the Civil Aeronautics Act which abandoned the restrictive phrases contained in the Railway Mail Pay Act and the Air Mail Act. Congress was aware of the fact that the restrictive language of the earlier statutes (which was abandoned in the Civil Aeronautics Act) permitted retroactive rates at least as far back as the date of commencement of the proceeding. If Congress felt that

[1] *U. S. v. New York Central R. R.*, 279 U. S. 73 (1929).

the Board's power to fix rates should be limited to the period starting with the commencement of a rate proceeding, it would have been a simple matter to carry over into the Civil Aeronautics Act the language used in the Railway Mail Pay Act and the Air Mail Act. But Congress did not do this. When one act grows out of another act it is entirely possible for the two statutes to have identical language, even where not intended, such language having been inadvertently carried into the new act. But when the language has been specifically changed, it is reasonable to conclude that the difference is deliberate and intentional. There is not a word of limitation in the Board's power in Section 406 of the Act, neither as to the amount of mail compensation nor the period for which it may be paid. To be sure, the power to fix rates which "shall continue in force until changed by the Commission after due notice and hearing" is entirely different from the power "to make such rates effective from such date as it [the Board] shall determine to be proper."

The majority points out that there is no reference in the Civil Aeronautics Act to subsidy as such and asserts that insofar as the Civil Aeronautics Act may be said to authorize subsidy, the Air Mail Act of 1934 originally, and as amended by the Air Mail Act of 1935, authorized
222 subsidy in much the same fashion. This is an erroneous conception of the 1934 and 1935 Acts. Under the Air Mail Act of 1934, the Postmaster General was authorized to award contracts to the lowest bidder provided the low bid was not in excess of 33 1/3 cents for loads not exceeding 300 pounds plus one-tenth of such base rate for each additional 100 pounds. In no case was the payment to exceed 40 cents per airplane mile. The powers of the Interstate Commerce Commission over mail pay were extremely limited under this Act and were not comparable to the Board's powers under the Civil Aeronautics Act. The ICC was directed to fix the fair and reasonable rates for the transportation of air mail "over each air mail route.

but not in excess of the rates provided for in the Act,"[6] and to review at least once a year the rates being paid in order to be assured that no unreasonable profit was accruing to the contractors.[7] The Act further provided that contracts which had been satisfactorily performed should be "continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms as the said Commission may prescribe . . . "[8] This was interpreted to mean that the Commission could reduce the successful bid rates on the temporary contracts but that it was powerless to increase rates even where the bid rates were resulting in substantial losses.[9] Irrespective of legitimate operating
223 costs, no rate could exceed 33 1/3 cents per mile, and the aggregate compensation resulting from excess loads was limited to 40 cents per mile.[10] A further limitation on the Commission's rate making power was the direction to fix rates for *each route* which, in connection with the rates fixed by the Commission for all other routes, would keep the aggregate cost of air mail compensation after July 1, 1938, within the limits of the anticipated postal revenue therefrom.[11]

The Air Mail Act of 1934 was amended in 1935, limiting some of the obvious defects of this Act and broadening the powers and duties of the ICC. It is interesting to note, however, that Section 6(c) as amended, permitted the Commission to increase, as well as decrease, the contract rates, but the 33 1/3 and 40 cent limits were not lifted, and no change was made in the direction that rates should be adjusted so that by July 1, 1938, payments to carriers should be within the anticipated postal revenues from air mail.[12]

[6] Section 6 (a).
[7] Section 6 (b).
[8] Section 6 (c).
[9] Air Mail Compensation, 206 I. C. C. 675, 690 (1935).
[10] Section 3 (a).
[11] Section 6 (e).
[12] Section 6(c) as amended.

In view of the foregoing strict limitations imposed upon the Commission's power to fix mail rates under the Air Mail Acts of 1934 and 1935, it is obvious that these are not the provisions of a subsidy statute which of necessity must grant enough power to accomplish the objectives set out in the Act. Witness, for example, the powers of the Civil Aeronautics Act which places no limitation upon the amount or time of the payments. Furthermore, a comparison of the Civil Aeronautics Act with other subsidy stat-
224 utes reveals a striking similarity. For example, the following provisions are found in Section 2(e) of the Emergency Price Control Act of 1942:

> "Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may on behalf of the United States . . . make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof . . ."

This language is comparable to that used in Section 406(a) of the Civil Aeronautics Act except that the Emergency Price Control Act makes no mention of the date such subsidy payments are to be effective, whereas the Civil Aeronautics Act specifically empowers the Board "to make its rates effective from such date as it shall determine to be proper."

Besides the wide difference in *language* between the Civil Aeronautics Act and other utility statutes, there is also a vast difference in the *objectives* to be attained. So far as the protection of the public from excessive rates is concerned, the objective is similar, and the granting of authority for its accomplishment is similar, but so far as national defense is concerned, the objective is fundamentally different. One of the primary objectives of the Civil Aeronautics Act is the development of air transportation as an instrument of national defense, which objective does

not appear in the other utility statutes, and in order to accomplish it, the Act not only grants to the Board broader powers than are granted under the other utility statutes, but imposes upon it broader responsibilities. The
225 Civil Aeronautics Act is a subsidy statute and places upon the Board the responsibility not only for protecting the general public from excessively high passenger and property rates, but also of protecting the carrier from unfair or unreasonably low mail rates in order that its services may not be impaired to the extent that it would be unable to perform the objective of national defense intended by the statute.

The Board itself has recognized that the rate-making functions under the Civil Aeronautics Act are entirely different from those of public regulatory bodies in fixing rates for the ordinary public utility services. In the *Pan American Rate* case, *supra*, the Board pointed out that Section 406(b) provides standards for the Board's guidance in determining the mail rate to be paid in each case. After mentioning three standards to be considered, the Board stated:

> "Had the statute prescribed no further standards for our guidance in fixing rates for the transportation of mail by aircraft, our rate-making task would not differ fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services. But the statute does not stop with the three standards above named.
>
> "In adopting the Civil Aeronautics Act of 1938, Congress, as the legislative history of the act shows, was fully aware of the financial position of the American air carriers and knew that in the present developmental state of the air transport industry the air carriers, in most instances, would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources. Yet the encouragement and development of an air transportation system adapted to the present and future needs of the for-
226 eign and domestic commerce of the United States and

of the national defense, as well as of the Postal Service was regarded as an essential national objective (Sec. 2 of the act.) To insure the fulfillment of that objective, Congress has imposed upon the Authority in Section 406(b) of the act, a duty to consider, in fixing the rate of compensation for the transportation of mail, another factor which affects in a vital degree the conclusion to be reached by the Authority. Thus, the Authority is required in fixing the rate to consider "the needs of each such carrier for compensation for the transportation of mail sufficient * * * together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Again in the *Mid-Continent Rate* case, *supra*, the Board referred to the factors to be taken into consideration in fixing a rate under Section 406(b) and stated:

> "The above factors which the Authority is directed to take into consideration in fixing and determining fair and reasonable rates under the act, differ from the tests which, under the influence of judicial decision during the past 40 years, have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

These early pronouncements of the Board make it clear that the Board recognized a difference in its duties under the rate-making provisions of the Civil Aeronautics Act of 1938 and the non-subsidy statutes which regulate non-subsidized utilities. Under a subsidy statute it is essential for a government agency, if it is to be able to accomplish the objectives of the statute, to have the power to provide for retroactive payments, as borne out by the fact that most of the subsidy arrangements actually made under the Emergency Price Control Act covered payments prior to the filing of any application or petition.

227 Perhaps the clearest pronouncement of the Board's power is found in the *American Rate* case,[13] 3 C.A.B. 323, 331 (1942), which states:

> "We conclude that Sec. 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited only by the procedural requirements of notice and hearing, and by the necessity of promoting the broad objectives of the Act."

Let us look at these "broad objectives of the Act" which the Board referred to in the *American Rate* case. In adopting the Civil Aeronautics Act of 1938, Congress was fully aware of the financial position of the American air carriers, and knew that in the developmental state of the air transport industry the air carriers would be unable to survive without revenues from the transportation of mail sufficiently large to make up for the deficiency in revenues from passenger and express sources. The encouragement and development of an air transportation system adapted to the present and future needs of the foreign and domestic commerce of the United States and of the national defense, as well as of the Postal service, was regarded as an es-

228 sential national objective. To insure the fulfillment of that objective, Congress imposed upon the Board in Section 406(b) of the Act a *duty* to consider in fixing the

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[13] It is of interest to note that Public Counsel in the *American* case, who is now general counsel of the Board, in oral argument stated,

"The language of the Act, Section 406(a), gives the Board the power to make such rates effective from such date as it shall determine to be proper. It seems to me that *the language confers the broadest sort of discretion on the Board to fix rates whenever in the exercise of its functions under the Act and in applying standards provided by the Act, decides it would be proper to fix a rate for a retroactive period.*

"*I don't know how Congress could have said in any more general terms, to have granted a discretionary power to fix rates prospectively or retroactively*, anything more general here, than in the words that have been selected in writing Section 406(a).

"It seems to me that the whole argument and contention of Mr. Hale and Mr. Westwood is directed to an attempt to show that these words 'to make the rate effective from such date as the Board shall determine to be proper,' do not mean as much as they say."

rate of compensation the need of each carrier for compensation for the transportation of mail sufficient to insure the performance of service, and together with all other revenues of the carrier to enable it under honest, efficient, and economical management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal service, and the national defense.

Thus, it should be remembered that the minimum compensatory rate guaranteed each certificated air carrier is not solely payment for the carriage of mail, but is also intended to effectuate other objectives, as the Board stated in the *American Rate* case, *supra:*

> "The use of mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service."

Mail pay is merely a convenient mechanism for disbursing compensation for the performance by certificated air carriers of a triple service in behalf of the Government; i.e., for (1) Commerce, (2) Postal Service, and (3) the National Defense. The Board recognized this in one of its earliest rate decisions.[11]

> "* * * the provision of section 406(b) quoted above, as well as other provisions of the act, especially those of Title IV 'Air Carrier Economic Regulation', and
> 229 section 2, 'Declaration of Policy', leave no doubt of the intent of Congress to recognize a public interest in air transportation beyond that reflected in the Postal Service, and to provide compensation therefor to the air carriers performing the service * * *.
>
> "In fixing and determining fair and reasonable rates of air mail compensation, section 406(b) of the act directs that the Authority shall take into consideration, among other factors, the condition that a holder of a certificate authorizing the carriage of mail by aircraft must provide necessary and adequate facilities and service for such transportation, and must maintain such standards of service as may be prescribed, and

[11] See footnote 1, *supra*.

shall further take into consideration the need of such air carrier for mail compensation 'sufficient to insure the performance of such service and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.'

"The development and encouragement of air transportation through an air mail rate which takes into consideration the general factors of the public interest, as set forth in the act, require that the rate-making provisions of the act shall be administered in such a manner as to expedite and not retard the attainment for air carriers of an economically sound and stable condition. * * * "

The compensation which the carrier receives becomes compensation not only for carrying the mail, but for the building up of a system of air commerce which will serve the nation's commerce and security as well. The civil aviation policy of this Government has from its inception recognized the civil air transport industry as an essential part of the national defense. The years preceding the adoption of the Civil Aeronautics Act of 1938 disclose a long period of government sponsorship of the development of civil aviation. While federal policy in those years had ex-
230 pressly recognized the national concern in the development of air transportation as an essential instrumentality of the nation's commerce and postal service, Congress gave formal expression for the first time in the Civil Aeronautics Act to the importance of air transportation to the national security when it laid down a comprehensive policy of government financial aid and encouragement as a means of implementing the national defense objective. President Roosevelt recognized the importance of national defense to the air transportation system when he stated in a communication dated January 24, 1939, to the National Aviation Forum:

"Civil Aviation is clearly recognized as the backlog of national defense in the Civil Aeronautics Act which set up the effective machinery for a comprehensive national policy with respect to the air.

"Underlying the statute is the principle that the country's welfare in time of peace and its safety in time of war rests upon the existence of a stabilized aircraft production—an economically and technically sound air transportation system, both domestic and overseas—an adequate supply of well-trained civilian pilots and ground personnel.

"This new national policy, set up by the Congress, views American aviation as a special problem requiring special treatment. Aviation is the only form of transportation which operates in a medium which knows no frontiers but touches alike all countries of the earth. One fact which stands out is that hardly another civil activity of our people bears such a direct and intimate relation to the national security as the civil aviation . . . "

Civil Aviation was recognized as the backlog of national defense because if was believed that through a subsidized air transport industry more planes could be kept in the air,
231 more pilots and ground personnel trained, more airports kept up, more airways kept operating, more research conducted, and a more stable market provided for the aircraft manufacturing industry for less money than in any other way. It is doubtful that there would have been a subsidy for air transportation if it had not been considered essential to our national defense.

Congress did not fail to provide the Board with adequate power to carry out its obligations under the Act. Section 406(a) permits the Board to make mail rates effective from "such date as it shall be determined to be proper." The only date which can be "proper" is one which permits the Board to fulfill its obligations and meet the responsibilities imposed upon it by the Act for the accomplishment of the objectives set forth therein.

/s/ JOSH LEE.

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Docket No. 484
Docket No. 2849

Service of Order and Opinion

Order No: E-1032 and 1033

REGISTERED:

T.W.A., Att: George H. Clay, 101 W. 11th St., Kansas City 6, Mo.

P.C.A., Att: Henry Beecken, Washington National Airport, Wash., D. C.

Frank J. Delany, Solicitor, Solicitor's Office, Post Office Dept., Wash., D. C.

REGULAR:

Gerald B. Brophy, c/o TWA, 101 W. 11th St., Kansas City, Mo.

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Charles H. Murchison, Suite 1016, Ring Bldg., 18th and M Sts., N.W., Wash., D. C.

Robert Hankins, Suite 1016, Ring Bldg., 18th and M Sts., N.W., Wash., D. C.

Robert J. Wilson, c/o P.C.A., Washington National Airport, Wash., D. C.

Roy C. Frank, Solicitor's Office, Post Office Department, Wash., D. C.

Louis J. Doyle, Solicitor's Office, Post Office Department, Wash., D. C.

Mr. Fahey, Post Office Department, Rm. 5353, Wash., D. C.

Gary Campbell, General Accounting Office, Postal Division, Arcade Bldg., Asheville, N. C.

Joe D. Walstrom, Acting Chief, Aviation Division, State Dept., Wash., D. C.

SPECIAL MESSENGER:

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Hawkins, Mrs. } POD

Bulletin Board
Docket Section
Stough
Leasure
Examiner: Walsh B-102
Public Counsel: Burt B-37 Dick B-37 Schneider B-37
No Special Mail Cards

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petition for Review of Order of the Civil Aeronautics Board

Argued June 16, 1948. Decided August 2, 1948

Mr. Gerald B. Brophy for petitioner.

Mr. Hardy K. Maclay, Assistant General Counsel, Civil Aeronautics Board, with whom *Mr. Edward J. Hickey, Jr.*, Special Assistant to the Attorney General, *Mr. Emory T. Nunneley, Jr.*, General Counsel, Civil Aeronautics Board, *Mr. William C. Burt*, Chief, Rates Section, Civil Aeronautics Board, *Messrs. Louis B. Sissman* and *Warren L. Sharfman*, Attorneys, Civil Aeronautics Board, *Mr. George Morris Fay*, United States Attorney, and *Mr. Oliver Carter*, Acting Chief, Enforcement and Litigation Section, Civil Aeronautics Board, were on the brief, for respondent.

Before EDGERTON and PRETTYMAN, JJ., and KEECH, District Judge, sitting by designation.

PRETTYMAN, J.: This case is before us upon a petition to review an order of the Civil Aeronautics Board which denied petitioner's request that the Board fix a domestic rate for its carrying of the mail for the period January 1, 1946, to March 14, 1947.

By an order dated October 26, 1945, the Board had fixed such a rate for petitioner.[1] The show cause order in that proceeding had been issued January 1, 1945, and the ensuing rate order was made effective as of that date. No motion was made for the reconsideration of that rate order, and no appeal from it was taken.

Petitioner says that it lost money in every month after October, 1945, except June, 1946, in part because of common post-war development, rising costs and declining mail revenues, and in part because of conditions peculiar to petitioner, these latter being principally the

1. Transcontinental & Western Air, Inc., Mail Rates, 6 C.A.B. 595.

grounding of its four-engine Constellations by the Administrator of Civil Aeronautics and a strike of its pilots. Therefore, on March 13, 1947, it filed with the Board the petition which is the premise of the present proceeding. It requested a redetermination of its rates, beginning January 1, 1946. The Board dismissed that petition so far as it requested the fixing of a rate for the period prior to March 14, 1947.

The Board held that it had no power to increase mail rates retroactively to a period in which a final rate order previously entered by the Board was in effect and unchallenged. Its order of dismissal was upon that basis. Commissioner Lee dissented. TWA now presents five points, but all are directed to the question of power. Both parties have briefed and argued extensively that question and that alone.

Upon first impression, it would appear that the Board's order would be valid even if it had power to select an earlier date, since it admittedly had discretion to select March 14, 1947, as the effective date. If that were an accurate impression of the whole case, the question of the Board's power to do something it did not do would be immaterial. But we think we must determine the question, because TWA said to the Board, and says to us, that its rates for the period January 1, 1946, to March 14, 1947, were less than fair and reasonable, and that the order of the Board refusing to consider those rates was arbitrary, capricious and a denial of due process. The Board says it had no power to do otherwise. If it had the power to consider that period, its denial of the petition would have to be premised on something more substantial than mere refusal. It is true that even if we disagreed with the Board on that proposition, its order would not necessarily be invalid, because there would remain the exercise by the Board of the discretion, plainly conferred upon it by the statute, to choose an effective date for its rate orders. But that situation would seem to bring into operation those provisions of the statute which contemplate that under such circumstances we would reverse in a technical sense but remand for further consideration by the Board.[2] So we proceed to consider the question presented and argued.

We agree with the position of the Board. The conclusion depends upon the meaning of that portion of the statute[3] which provides that the Board is empowered and directed to fix fair and reasonable rates of compensation for the transportation of mail by aircraft "and to make such rates effective from such date as it shall determine to be proper".

In the first place, we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power.[4] TWA says that the above-quoted provision of the statute supplies the requisite plain specification. But we think that that clause was inserted for the purpose of resolving a controversy concerning the power of the Board to make its rate orders effective as of the date when the proceeding began. The same controversy had existed in respect to railway mail pay and had been settled by the

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2 The language of the statute is "... and if need be, to order further proceedings by the Board." Sec. 1006(d) of the Act, 52 STAT. 1024 (1938), 49 U. S. C. A. § 646(d).

3 Sec. 406(a) of the Act, 52 STAT. 998 (1938), 49 U. S. C. A. § 486(a).

4 Nield v. District of Columbia, 71 App. D. C. 306, 314 *et seq.*, 110 F. 2d 246, 254 *et seq.* (1940), particularly the authorities cited in notes 35-39.

Supreme Court.[5] Under the Air Mail Act of 1934, as amended in 1935,[6] the Interstate Commerce Commission made its orders effective as of the date of the initiation of the proceedings, but there was sharp difference of opinion among members of the Commission as to the validity of that action.[7] The dissenting Commissioners were of the view that the *New York Central* case[8] rested upon the statutory provision compelling railroads to carry the mail, whereas the air mail statute contained no such compulsion. They thought that the absence of that compulsion removed the sole basis for the Court's upholding of retroactive effectiveness.

We need not repeat the long quotations from Congressional hearings, reports and debate relative to the legislative history of the Air Mail Act of 1938, presented to us by the parties.[9] Suffice it to say that the addition to the original bills of the "make effective" clause appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail.[10] And it had been established that the Interstate Commerce Commission could make its orders effective as of the date of the beginning of the proceedings; but it had never been claimed that the Interstate Commerce Commission had unfettered retroactive power.

The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past. A reading of the whole paragraph in which it appears as a clause, makes this clear. In this posture of affairs we must give great weight to the presumption against retroactivity and to the limited legislative purpose apparent from the history.

But quite apart from the inferences and presumptions just discussed, two major considerations lead us to our conclusion. The first is the clear nature of the scheme of the statute. There are at least two, and perhaps more, different schemes or plans possible in a system of payment for service such as this. The first is where a price per unit is fixed. In such an arrangement, the fixing of the price is customarily in advance; the contractor makes or loses as his economic skill permits, and he bears the risks of the operation. This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is "rates". The second general type, or plan, is where a net result of the operation, or of a unit thereof, is contemplated and provided for. In such an arrange-

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[5] United States v. N. Y. Central, 279 U. S. 73, 73 L. Ed. 619, 49 S. Ct. 260 (1929).

[6] 48 STAT. 933, as amended, 49 STAT. 614.

[7] Air Mail Compensation, 216 I. C. C. 166 (1936) (dissenting opinion at 191); Air Mail Compensation, 222 I. C. C. 602 (1937) (dissenting opinions at 610).

[8] *Supra* note 5.

[9] *Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760*, 75th Cong., 1st Sess. 179, 180, 239, 291, 343, 483 85, 523, 525; H. R. REP. No. 911, 75th Cong., 1st Sess. 18; SEN. REP. No. 686, 75th Cong., 1st Sess.; *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3d Sess.; *Hearings before Subcommittee of Senate Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess.; H. R. REP. No. 2254, 75th Cong., 3d Sess.; 81 CONG. REC. 8839, 8882, 9202, 9204; 83 CONG. REC. 6725.

[10] For a general history of the development, see "Federal Regulation of Aviation" by Ballard, 60 HARV. L. REV. 1233 (1947); particularly on Mail Compensation, *id.* at 1261.

ment, advance payments may be made to the contractor but the final figure cannot be determined until the operation, or the controlling unit thereof, is complete; the net to the contractor is the same no matter what the quality of the performance may be and he bears none of the risks of the operation. The so-called "cost-plus" contracts fall within this classification.

We think that the scheme of the statute before us is of the former kind. The statute[11] directs the Board to fix "fair and reasonable rates of compensation for the transportation of mail by aircraft, to prescribe the method ("aircraft-mile, pound-mile, weight, space, or any combination thereof") for ascertaining such rates for each carrier; and it requires the Postmaster General to pay "the rates so fixed and determined". The statute further provides that the Board shall take into consideration, "among other factors," the required facilities and service, the character and quality of such service "and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

We think that anyone reading the whole of the statutory provisions relative to these rates[12] must conclude that they specify the fixing of a rate, or rates, for the carrying of a physical unit of mail, and that they contemplate future operation. There is no reference to an offset against past losses or to a diminution of past profits. The whole is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto.

It is argued that the consideration of the "need" of the carrier for adequate revenue, required by the last above-quoted provision of the statute, is necessarily retroactive in operation. We do not think so. Anticipated need is as clearly meant as is demonstrated inadequacy. The provision is not different in principle from the need for sufficient revenue to insure financial stability, which is the rule applicable to public utilities generally[13] and which certainly contemplates the future and not the past.

We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit.

The second major proposition which impels our conclusion is the result which would ensue if the statute were given unlimited retroactive effect. If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. This statute makes no differentiation. The financial confusion which would follow from the latter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure

11 Sec. 406 of the Act, 52 STAT. 995, 49 U. S. C. A. § 486.

12 *Supra* note 11.

13 Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591; 88 L. Ed. 333, 64 S. Ct. 281 (1944).

No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. We find no indication that Congress meant to create so great uncertainty. We would not read a statute as yielding such results unless the language was clear and certain. We think that if Congress had intended to provide for recoupment of past losses, it would necessarily have spelled out the terms of the proposal and not have left it to a clause which, if interpreted with that effect, would also have so obviously disastrous effects.

The Board urges long administrative interpretation in support of its position, but our examination of its references in that respect shows that they dealt with policy and not with power.[14] The Board asserted its policy "Aside from the question of whether it has the statutory power to review a rate prior to the date of the institution of the proceeding . . . ."[15] Thus, it has never gone back of the inauguration of the proceeding, but, until this case, it has never asserted its lack of power to do so. TWA, on the other hand, urges what it considers examples of retroactive application of Board orders. But we do not find those instances indicative of the retroactivity which is necessary to support its position here. TWA also urges the implications from the Board's failure, over the years, to say it had no retroactive power. We think that the administrative history of this statute has no material bearing one way or the other upon the question of statutory power. Our conclusion, as we have said, rests upon the two major propositions which we have discussed.

The order of the Board is

Affirmed.

[14] Continental A. L., Mail Rates—Routes Nos. 29 and 43, 2 C.A.B. 683 (1941); Continental A. L., Mail Rates—Routes 29 and 43, 3 C.A.B. 395 (1942); Mid Continent Air., Mail Rates—Routes Nos. 26 and 48, 3 C.A.B. 464, 466 (1942); Braniff Air., Mail Rates—Routes 9, 15 and 50, 3 C.A.B. 633, 635-37 (1942); Transcontinental & W. A., Mail Rates, 4 C.A.B. 139, 143 (1943); All American Aviation, Mail Rate—Route No. 49, 4 C.A.B. 354, 357 (1943); Pan American Airways, Inc., Alaska Mail Rates, 4 C.A.B. 61, 69 (1944); Caribbean Atlantic Air., Mail Rate, 7 C.A.B. 943, 946 (1947).

[15] Continental A. L., Mail Rates—Routes 29 and 43, 3 C.A.B. 395, 401 (1942).

[fol. 116] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 2, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

On Petition for Review of Order of the Civil Aeronautics Board

Before Edgerton and Prettyman, JJ., and Keech, District Judge Sitting by Designation

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On consideration whereof, It is now here adjudged and decreed by this Court that the order of the said Civil Aeronautics Board on review in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Prettyman.

Dated August 2, 1948.

[fol. 117] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 18, 1948. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9763

TRANSCONTINENTAL & WESTERN AIR, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

Gerald B. Brophy, Attorney for Petitioner.

Certificate of Service

I certify that on this date I have caused the foregoing designation to be served upon all parties to this proceeding by mailing copies properly addressed with postage prepaid to Emory T. Nunneley, Jr., General Counsel, and William C. Burt, Chief, Rates Section, Civil Aeronautics Board, Washington 25, D. C., Edward J. Hickey, Jr., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C., and Roy C. Frank, Solicitor's Office, Post Office Department, Washington 25, D. C.

Dated, New York, N. Y., October 18, 1948.

Gerald B. Brophy, Attorney for Transcontinental & Western Air, Inc.

[fol. 118] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 117, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for petitioner in the case of: Transcontinental & Western Air, Inc., Petitioner, vs. Civil Aeronautics Board, Respondent, No. 9763, October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this nineteenth day of October, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 119] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 6, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration or decision of this application.